Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WILLIAM HAROLD KELLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
NO DATE OF EXECUTION SET

QUESTION PRESENTED

Long after petitioner's trial, prosecutors for the first time disclosed "evidence disposition forms" identifying a significant amount of crime scene evidence that had never been provided to the defense. Petitioner challenged the failure to disclose the forms under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Petitioner alleged that the forms were "material" because they would have led his counsel to secure the exculpatory evidence described on the forms. The Florida Supreme Court rejected his claim, holding that *Brady* applies only to evidence that would itself be both "favorable" and "material" at trial. Under that standard, the court held that because *the forms themselves* would not have changed the jury's judgment, no *Brady* violation occurred. On this view, the materiality of the evidence described in the forms was irrelevant.

The Question Presented is:

Did the Florida Supreme Court err in holding that the prosecution's duty to disclose under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), is limited to evidence that would itself be both "favorable" and "material" at trial, without regard to whether that evidence would have led to the disclosure of material exculpatory evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Harold Kelley respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The trial court's ruling is unpublished and reproduced at Pet. App. 1a-13a. The Florida Supreme Court's ruling affirming and rejecting petitioner's original request for habeas corpus is published at 3 So. 3d 970 and reproduced at Pet. App. 14a-19a.

JURISDICTION

The Florida Supreme Court denied petitioner's timely petition for rehearing on February 25, 2009. Pet. App. 20a-21a. Justice Thomas subsequently extended the time to file this petition to and including July 10, 2009. App. No. 08A1009. This Court has jurisdiction under 28 U.S.C. §§ 1257(a) and 2101(d).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides that no person shall be deprived of life or liberty without due process of law.

STATEMENT OF THE CASE

Petitioner was convicted of murder and sentenced to death after a first jury hung and a second initially deadlocked before the trial judge broke the impasse with a non-standard supplemental instruction that no "more" or "clearer" evidence existed. Petitioner unsuccessfully argued that the

prosecution violated due process by destroying crime scene evidence prior to trial pursuant to a destruction order. Two decades later, the State for the first time disclosed evidence disposition forms showing that much of the crime scene evidence had actually been transferred to other state law enforcement agencies prior to the destruction order. Petitioner claimed that the evidence was material under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), including particularly because the forms would have led to the disclosure of the crime scene evidence, which would have persuaded the closely divided jury of his innocence. The Florida Supreme Court found no *Brady* violation, however, because *the forms themselves* were not material evidence, without regard to whether they would have resulted in the disclosure of other valuable evidence.

1. The Due Process Clause of the Fourteenth Amendment can give rise to two different types of claims that the prosecution failed to provide a defendant with evidence relevant to his defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963), holds that the prosecution must disclose "evidence favorable to an accused" that is "material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution."

A different standard applies when the evidence has been destroyed. Regarding such a case, the prosecution may not in bad faith fail to preserve evidence relevant to the defense. *E.g.*, *Arizona v. Youngblood*, 488 U.S. 51 (1988).

2. In 1966, Charles Von Maxcy was murdered in Highlands County, Florida. Investigators gathered a variety of physical evidence from the crime scene that

was sent to the state crime lab in Tallahassee for testing. The evidence was then returned to the submitting offices, including the Highlands County Sherriff. The transfer was recorded on evidence disposition forms that the State would not disclose until forty years later.

The State subsequently charged John Sweet for arranging Von Maxcy's contract murder. Sweet was a career criminal who had had an affair with Von Maxcy's wife. Prosecutors apparently requested and received a limited amount of the crime scene evidence – approximately three pieces – from the submitting offices for use in the trial. We refer to this as the "Sweet trial evidence."

They did not request approximately thirty-five further pieces of evidence, which presumably remained in the possession of the submitting agencies. We refer to this as the "non-Sweet crime scene evidence."

3. The State's first prosecution of Sweet in 1967 resulted in a mistrial. A second prosecution in 1968 resulted in a conviction that was overturned on appeal. The State did not pursue a third trial.

In 1976, eight years after the second trial, the State requested and received the trial court's authorization to destroy the Sweet trial evidence, which was in the court files. The order did not authorize the destruction of the non-Sweet crime scene evidence, which had been returned to the submitting authorities and was not in the court files, although again the State would not disclose that fact for decades.

4. In 1981, Sweet cut a deal with state authorities to admit masterminding the Von Maxcy

murder but to finger petitioner William Kelley for the murder, in exchange for immunity from prosecution for the murder and for perjury. The State indicted Kelley for murder.

In response to Kelley's request, the prosecution stated that it was in possession of no evidence subject to disclosure under *Brady*. It made no mention of the non-Sweet crime scene evidence. The prosecution instead advised Kelley's counsel that evidence had been destroyed pursuant to the trial court's order.

In 1984, Kelley moved to dismiss the indictment on the ground that the prosecution violated due process by destroying the Sweet trial evidence, which was critical to his defense. The trial judge rejected Kelley's motion. The court reasoned that "there is no implication at all that the [destruction] was in bad faith." Further, "I'm reminded in other areas of law it's specifically said that everyone is entitled to a fair trial, not a perfect trial." Trial Tr., Vol. 1, at 79-80 (Jan. 12, 1984).

At trial, the prosecution rested its case almost entirely on Sweet's self-interested assertions that Kelley had committed the murder.

Kelley's first trial ended in a hung jury. In a second trial in 1984, the jury deadlocked. The trial judge broke the deadlock by instructing the jury (erroneously, it turns out) that "there is no reason to believe there is any more evidence or clearer evidence could be produced on either side." The State made no effort to correct this misstatement. The jury then finally convicted Kelley. Based on an eight-to-three recommendation by the jury, the judge sentenced him to death.

5. Kelley appealed, raising, *inter alia*, his argument that the court's deadlock instruction impermissibly coerced the jury into returning a verdict. The Florida Supreme Court disagreed because by all accounts the instruction was accurate (given that the State has not disclosed the forms revealing the non-Sweet crime scene evidence) and therefore not prejudicial: "while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given." *Kelley v. State of Florida*, 486 So. 2d 578, 585 (Fla. 1986).

Kelley also argued that the prosecution had violated due process by destroying the Sweet trial evidence. The Florida Supreme Court held that, although the destruction of that evidence was "unfortunate," petitioner's rights had not been violated because the state had not acted in bad faith, given that it had decided not to prosecute Sweet a third time and did not anticipate charging another person with the Maxcy murder. The court "emphasize[d]" that "if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." *Id.* at 582.

The court further concluded that petitioner "failed to establish a sufficient degree of prejudice" from the destruction of the Sweet trial evidence. *Id.* The court thus deemed it appropriate "to defer to the findings of the trial court," which as noted had stated (before trial) that it expected that the destruction of the Sweet trial evidence would not deprive Kelley of a fair trial. *Id.*

The Florida Supreme Court specifically limited its analysis to Kelley's challenge to the prosecution's

destruction of the Sweet trial evidence: "real evidence, principally taken from the scene of the crime – a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment." *Id.* at 580.

The state Supreme Court's opinion thus did not discuss an argument that Kelley had not raised in the trial court but attempted to raise for the first time in a supplemental brief on appeal: that the prosecution had destroyed not merely the Sweet trial evidence but also non-Sweet crime scene evidence. The State, which had led Kelley to believe that *all* crime scene evidence had been destroyed, did not advise Kelley or the court that the non-Sweet crime scene evidence had not actually been destroyed pursuant to the 1976 court order because it had instead remained in the possession of the submitting authorities. Instead, it objected that Kelley "ha[d] not preserved this argument," and moreover it had not acted in bad faith in supposedly *destroying* the non-Sweet crime scene evidence because the fact that "evidence might have been exculpatory does not establish that the evidence had an exculpatory value that was apparent before it was destroyed." Resp. Fl. S. Ct. Br., case no. 65,134, at 16. Notably, the State did not maintain that Kelley had not been prejudiced by the unavailability of this evidence at trial.

This Court denied Kelley's petition for certiorari, which sought review of, *inter alia*, the state Supreme Court's disposition of his destruction of evidence

claim. *Kelley v. Florida*, 479 U.S. 871 (1986) (No. 86-106).

6. Kelley sought state post-conviction review. He again asserted that the State had violated due process by destroying evidence. But Kelley now focused on what he and his counsel believed to be the *destruction* of the non-Sweet crime scene evidence – *i.e.*, the argument that he had unsuccessfully attempted to introduce in a supplemental brief on direct appeal. Kelley's attorneys thus continued to litigate on the basis of the prosecution's representations that all of the crime scene evidence had been destroyed prior to Kelley's trial.

The trial court denied relief on the same basis as it had denied Kelley's pre-trial motion: "Although there are some differences between the evidence listed in the instant Motion and that argued before the court in the Motion to Dismiss, those differences are immaterial." *Kelley v. State*, 569 So. 2d 754, 759 (Fla. 1990).

On appeal, the State reversed positions: having argued on direct appeal that Kelley could not pursue the claim in that proceeding, it now argued that Kelley had in fact litigated the issue through his supplemental brief on direct review. Alternatively, it maintained that prosecutors had not acted in bad faith in destroying the non-Sweet trial evidence. Again, the State notably did not assert that Kelley had not been prejudiced.

The Florida Supreme Court affirmed on the ground that it had already decided that the State did not destroy the evidence in bad faith. Kelley's supplemental brief on direct appeal, the court

reasoned, had discussed "many of the items" raised by his post-conviction application:

> Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed. The state was not at fault in the destruction of the evidence. (citing the direct appeal ruling.) The *destruction of evidence* in this case did not deprive Kelley of due process of law. *See Arizona v. Youngblood*, 488 U.S. 51 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990) (emphasis added).

7. A federal district court granted petitioner a writ of habeas corpus on other grounds. Emphasizing that he had granted such relief only twice before in three decades on the bench, the district judge found that "[t]his case presents many [instances] of prosecutorial misconduct. [This prosecutor] has a habit of failing to turn over exculpatory and impeachment evidence." *Kelley v. Singletary*, 222 F. Supp. 2d 1357, 1363 (S.D. Fla. 2002). For example, the prosecution suppressed a more detailed version of a report of a witness who described an individual who did not resemble petitioner, but who (it later turned out) matched a

friend of Sweet who traveled to Florida around the time of the murder, returned with a large sum of cash, and *admitted* to killing Von Maxcy. *Id.* at 1365-66 & n.6. The court also found, for example, that petitioner had been prejudiced by the prosecution's unlawful withholding of information regarding Sweet's immunity deal and a police report confirming that Kelley's fingerprints did not match any of those in Von Maxcy's house and car. *Id.* at 1364-66.

The Eleventh Circuit reversed. The court did not doubt that the State had withheld exculpatory evidence. But it held that petitioner's claim did not overcome the state court's finding that the suppression of the evidence was harmless. The court described this as an "extraordinary case" in which the prosecution's key witness, Sweet, was "a reprehensible villain who literally got away with murder." *Kelley v. Secretary for the Dep't of Corrs.*, 377 F.3d 1317, 1369 (11th Cir. 2004).

8. In 2006, Kelley moved in state court for an order that the State produce and make available for DNA testing certain evidence in the case. In response, the State for the first time disclosed the evidence disposition forms, which in turn revealed for the first time that significant crime scene evidence in the case – the non-Sweet crime scene evidence – had been returned to the submitting authorities *before* the 1976 destruction order and presumptively had *not* been destroyed pursuant to that order, which applied only to the Sweet trial evidence in the clerk's possession.

The non-Sweet crime scene evidence included:

- Blood-soaked carpet sections, a blood-soaked sheet, and other crime scene evidence showing the violent and bloody nature of the murder;
- Evidence from the victim's car (including the floor mat, steering wheel and brake pedal), which Kelley had supposedly used to escape from the bloody murder but which showed no blood at all;
- Hair and fingernail scrapings, along with samples of the victim's blood and hair for comparison; and
- The victim's clothing and personal effects.

The trial court found, however, that by the time of its ruling in 2006, the evidence no longer existed and therefore could not be subjected to DNA testing. It accordingly denied relief. It made no finding as to whether the evidence existed at the time of Kelley's trials.

The Florida Supreme Court affirmed. The court recognized that the "evidence collected in the Sweet trials was destroyed by court order in 1976," as well as that "none of the requested items were located despite a diligent search." *Kelley v. State*, 974 So.2d 1047, 1051 (Fla. 2007).

9. In 2007, Kelley brought this application for state post-conviction relief based on the State's belated disclosure of the evidence disposition forms. Kelley's previous claims had been directed at the State's apparent pre-trial *destruction* of evidence, which he maintained had occurred in bad faith in violation of due process under cases such as *Youngblood*, *supra*.

Kelley filed this 2007 application, by contrast, having finally been told by the State for the first time

that much of the crime scene evidence had *not* been included within the materials permitted to be destroyed in 1976 under the court order. Kelley accordingly argued that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding that evidence. As noted, a claim under *Brady*, unlike *Youngblood*, does not depend on the prosecution's good or bad faith.

Kelley argued that the crime scene evidence withheld by the prosecution was material in two separate respects. First, it would have led to the discovery of exculpatory evidence – *i.e.*, the evidence described in the forms that had not been used in the State's prosecution of Sweet. Thus, the bloody carpets and clothing, when contrasted with the blood-free wheel, floor mat, brake pedal, and other parts of the car, would have allowed petitioner not only to impeach Sweet's testimony but visually demonstrate to the jury the sheer implausibility of the State's theory of how petitioner committed the murder. Second, the forms would have precluded the trial judge's false deadlock instruction to the jury that no further or better evidence about the crime was available.

The trial court refused to hold a hearing and summarily denied petitioner's application. Pet. App. 1a-13a (*State v. Kelley*, No. CR81-0535 (Fla. 10th Cir. Ct. Dec. 20, 2007) (Order Denying Motion for Postconviction Relief); *State v. Kelley*, No. CR81-0535 (Fla. 10th Cir. Ct. Jan. 28, 2008) (Order Denying Motion for Rehearing))

Kelley appealed and also filed a parallel habeas petition directly in the Florida Supreme Court, which

affirmed. Pet. App. 14a-19a (*Kelley v. State*, 3 So. 3d 970, 974 (Fla. 2009)). The court reasoned:

> To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence (2) was willfully or inadvertently suppressed by the State and, (3) because the evidence was material, the defendant was prejudiced. . . . To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict.

Id. at 16a. The court concluded that "the record conclusively demonstrates that Kelley is not entitled to relief" because it

> demonstrates that the evidence disposition forms at issue are neither favorable nor material. These forms memorialize the transfer of evidence from the Florida Sheriff's Bureau to local officials after laboratory testing. They do not exculpate or exonerate Kelley; the forms do not mention Kelley or implicate someone else. Likewise, they do not offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses. Furthermore, there is not a reasonable probability that, had the evidence disposition forms been disclosed, the result of the proceedings would have been different. Our confidence in the outcome is not undermined. Accordingly, because the evidence disposition forms are not favorable to Kelley and because the State's failure to

> disclose them did not prejudice Kelley, no *Brady* violation occurred.

Id. at 17a-18a.

"To the extent Kelley is seeking to use the evidence disposition forms to relitigate his prior claims regarding the destroyed evidence," the court continued, "he is procedurally barred from doing so." *Id.* at 18a. The court noted its prior rulings that the destruction of the more limited set of Sweet trial evidence "did not prejudice Kelley's case." Further, the court could "not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search." *Id.*

The court separately denied Kelley's direct petition for a writ of habeas corpus alleging that the State had violated *Brady* by failing to *disclose* the existence of the non-Sweet crime scene evidence, which the court incorrectly characterized as alleging "a manifest injustice occurred because evidence was *destroyed* prior to Kelley's trial." *Id.* at 15a (emphasis added).

10. Kelley sought leave from the Eleventh Circuit for permission to file a successive habeas petition challenging the state courts' conclusion that the prosecution had not violated *Brady* by failing to disclose the evidence disposition forms. The court of appeals denied that request. *In re: William Harold Kelley*, No. 09-11215-P (11th Cir. Apr. 15, 2009).

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court's decision upholding petitioner's conviction and death sentence rests on a profound misapplication of the principles laid down by this Court in *Brady v. Maryland* and its progeny. The ruling below equally conflicts with rulings of several circuits. By granting certiorari, this Court also will resolve a widely acknowledged and frequently recurring circuit conflict over whether the prosecution's duty to disclose evidence under *Brady* applies to evidence that is inadmissible at trial. Because this case is an ideal vehicle in which to resolve the question presented, certiorari should be granted.

1. In 2006, prosecutors for the first time provided petitioner with "evidence disposition forms" detailing the whereabouts of critical evidence in the case that the prosecution had previously led petitioner to believe had been destroyed. The forms identified roughly three dozen pieces of crime scene evidence that were returned from the state crime lab to submitting authorities prior to the 1976 order authorizing the destruction of the distinct Sweet trial evidence, which had remained in the possession of the clerk. Petitioner promptly challenged the State's previous failure to provide the forms, alleging that the prosecution had violated its duty under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), to disclose material evidence.

The Florida Supreme Court rejected petitioner's claim by artificially truncating the prosecution's duty under *Brady*. In the court's view, to establish a *Brady* violation, a defendant must prove both that the suppressed evidence itself is "favorable" and also

"a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict." Pet. App. 16a. The court elaborated on that standard in the course of limiting its analysis to the conclusion that *the forms themselves* would have been "neither favorable nor material" at trial. *Id.* at 17a. It reasoned that the State had not violated due process because the forms merely "memorialize the transfer of evidence," they "do not mention Kelley or implicate someone else" or "offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses." *Id.*

Based on its rigidly narrow reading of *Brady*, the Florida Supreme Court consciously accorded no weight to the evidence identified on the forms themselves, which petitioner's trial counsel obviously would have sought to secure had they been made aware of that evidence. The court simply gave no weight to petitioner's arguments that hair and fingernail scrapings would have been very valuable in identifying potential other assailants and excluding petitioner as the attacker and that bloody carpet sections may have included footprints or other potentially relevant evidence.

Kelley also explained that the non-Sweet crime scene evidence "would have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including the bloodied carpets and hallways runners and (ii) the absence of blood evidence connecting Kelley to the crime." Pet. Fl. S. Ct. Br., case no. 08-608, at 31-32. In particular, the suppressed evidence would have illustrated vividly the total implausibility of the prosecution's theory

that Kelley had fled the bloody scene in Von Maxcy's car, which contained not a speck of blood, and would have dramatically undermined the credibility of the witness on whom the State's entire case turned, John Sweet, who testified as to this alleged fact.

Petitioner also argued that the incorrect deadlock instruction conveying the unmistakable impression that nothing was to be gained by dubious jurors holding out for a new trial was a direct, highly prejudicial result of the suppression of the existence of other crime scene evidence. Had the jury not been inaccurately told that no "more" or "clearer" evidence could be presented, the trial might well have ended in an acquittal or another hung jury. Moreover, given that Kelley's lawyers – hamstrung by the absence of any crime scene evidence – did not present any evidence at trial, the incorrect instruction that no other evidence existed may have subtly conveyed the message to the jurors that there simply was *no* favorable evidence the defense could have presented. On petitioner's direct appeal, the Florida Supreme Court had agreed that the instruction was unlawful, but had deemed it non-prejudicial only because at the time it was mistakenly believed to be accurate. *See supra* at 7.

But the Florida Supreme Court's interpretation of *Brady* rendered all of these arguments irrelevant as a matter of law. The court instead limited its analysis of the forms' "materiality" to their own intrinsic value to the jury's decision.

2. The Florida Supreme Court's decision conflicts with this Court's precedents. The Court's seminal decision in *Brady* held that "the suppression by the prosecution of evidence favorable to an

accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The "touchstone" of materiality is a "reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419 (1995).

This Court's precedents sensibly reject attempts to narrow the *Brady* materiality inquiry and instead recognize that evidence may have a sufficient effect on the outcome of the case in a number of ways. Most directly, evidence may exculpate the defendant or impeach prosecution witnesses. *E.g.*, *Kyles*, 514 U.S. at 433-34.

But evidence may be material even if its effect on the trial is less direct. Most relevant here, *United States v. Bagley*, 473 U.S. 667, 682 (1985), recognized that the failure to disclose evidence may "impair the adversary process" in violation of *Brady* if it caused the defense to "abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." The Court accordingly concluded that the materiality inquiry encompasses "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *Id.* at 682-83.

More recently, *Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam), addressed *Brady*'s application to a polygraph test that tended to show that key government witnesses had testified falsely but that was itself inadmissible. The Court found the evidence immaterial, but *not* merely because it could not have been admitted at trial. Instead, the Court reasoned that, unlike here, the defendant's claim that

the polygraph test would have led to the development of other admissible evidence was "based on mere speculation." *Id.* at 6.

This broader assessment of the materiality of suppressed evidence is essential to effectuate the due process guarantee protected by *Brady*. A rule limiting the prosecution's duty under *Brady* to evidence that would itself persuade the jury would open a gaping hole in the obligation to disclose evidence essential to a fair and accurate determination of the truth. To take one simple and recurring example, prosecutors would be free to withhold lists of witnesses they had interviewed. But that information may provide the defense with information essential to developing its case and providing a complete factual picture to the jury. As this Court explained in *Bagley*, "When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision." 473 U.S. at 694. Absent such disclosures, "an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense." *Id.*

The Florida Supreme Court's decision squarely conflicts with this Court's decisions. The proper assessment of the materiality of the evidence disposition forms suppressed by the State cannot be artificially limited to whether the *forms themselves* "implicate someone else" or "offer any means of impeachment." *Contra* Pet. App. 17a. Rather, the court should have determined (i) whether the

evidence forms would have led Kelley's counsel to locate the non-Sweet trial evidence identified by the forms, and (ii) what the effect of *that* evidence would have been on the jury.

In addition, the impact of the newly revealed suppressed evidence at issue here should have been considered together with the evidence previously found to have been suppressed (*see supra* at 10), an analysis no court has ever undertaken. The State should not be able to avoid a finding of a *Brady* violation by disclosing its suppression of evidence in dribs and drabs over the years and thereby avoiding judicial review of all of the suppressed evidence as a whole. *See Kyles v. Whitley*, 514 U.S. at 421 (*Brady* analysis "turns on the cumulative effect of all . . . evidence suppressed by the government").

3. The ruling below equally conflicts with rulings of the federal courts of appeals. Four circuits – the Second, Sixth, Seventh, and Ninth – all unambiguously take a broader view of the materiality inquiry. Each has held that *Brady* requires an assessment of whether suppressed items would have led the defense to uncover still further material evidence. *Price v. Thurmer*, 514 F.3d 729, 730 (7th Cir. 2008) (Posner, J.) ("There is no obligation to turn over immaterial evidence to a defendant . . . unless it is apparent that it might lead to the discovery of material evidence."); *United States v. Rodriguez*, 496 F.3d 221, 226 n.4 (2d Cir. 2007) ("The objectives of fairness to the defendant, as well as the legal system's objective of convicting the guilty rather than the innocent, require that the prosecution make the defense aware of material information potentially leading to admissible evidence favorable to the

defense."); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) ("Certainly, information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes."); *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible.").

4. The decision below also directly implicates a closely related and recurring circuit conflict that a ruling in this case would almost certainly resolve. "The circuits are split on whether a petitioner can have a viable *Brady* claim if the withheld evidence itself is inadmissible." *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc). Most circuits hold that suppressed evidence may be material, even if it could not be admitted at trial, if (as alleged in this case) it would lead to the discovery of other material admissible evidence. *E.g.*, *id.* at 5; *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) ("[W]e need only satisfy ourselves that: [1] either all or part of the [evidence] is admissible; [2] the [evidence] could lead to admissible evidence . . . ."); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) ("[I]n order to find that actual prejudice occurred . . . we must find that the evidence in question, although inadmissible, would have led the defense to some admissible material exculpatory evidence."); *Felder v. Johnson*, 180 F.3d 206, 212 & n.7 (5th Cir. 1999) (noting that the Fifth and Ninth Circuits apply the same rule, i.e., asking if disclosure of the evidence—whether admissible or not—"would have created a reasonable probability that the result of the proceeding would have been

different"); *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999). Some states agree. *E.g.*, *Stokes v. State*, 402 A.2d 376, 380-81 (Del. 1979) ("[T]o be material under *Brady*, undisclosed evidence must be either: (a) admissible evidence . . . ; Or (b) there must be a showing on record . . . that it would have, or could have led to admissible evidence."); *State v. Spurlock*, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993) ("The prosecutor's duty to disclose is not limited in scope to 'competent evidence' or 'admissible evidence.' The duty extends to 'favorable information' unknown to the accused."); *Workman v. Commonwealth*, 636 S.E.2d 368, 376-77 (Va. 2006) ("Because of the requirement that the outcome of the proceeding be affected, we consider whether the suppressed, inadmissible evidence would have led to admissible evidence.").

Those rulings squarely conflict, however, with the holding of the Fourth Circuit and the courts of five states that admissibility is a prerequisite to materiality; those rulings (like the Florida Supreme Court's decision in this case) deem irrelevant that the inadmissible evidence would disclose other material, admissible evidence. *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (Luttig, J.) (holding that the statements that Hoke wished to admit as exculpatory "may well have been inadmissible at trial under Virginia's Rape Shield statute, and therefore, as a matter of law, 'immaterial' for *Brady* purposes"); *United States v. Sedgwick*, 345 A.2d 465, 473 (D.C. 1975) (holding that the disclosure of a police report containing another person's admission of guilt for the defendant's alleged crime was not required because "the so-called 'admission by another person' never reached the level of evidence. It was inadmissible

hearsay . . . ."); *State v. Williams*, 2008-Ohio-6842, 2008 WL 5381480, ¶ 26 (Ohio Ct. App. Dec. 19, 2008) ("Evidence is not considered material under *Brady* when the evidence is inadmissible under applicable state evidence rules."); *Commonwealth v. Lambert*, 884 A.2d 848, 857 (Pa. 2005) ("[I]nadmissible evidence cannot be the basis for a *Brady* violation."); *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997) (en banc) ("[T]he prosecution has no duty to turn over evidence that would be inadmissible at trial."); *State v. Chu*, 643 N.W.2d 878, 886 (Wis. Ct. App. 2002) (holding that suppressed evidence "was not material because it was not admissible and, therefore, would not have affected the outcome of the trial."). Other precedent is inconsistent. *Compare People v. Pecoraro*, 677 N.E.2d 875, 882-83 (Ill. 1997) (admissibility required) *with People v. Beaman*, 890 N.E.2d 500, 511 (Ill. 2008) (admissibility not required).

The conflict arises in part from a perceived ambiguity in this Court's per curiam summary reversal in *Wood v. Bartholomew*, which as noted held that an inadmissible polygraph exam was not material, notwithstanding the defense's claim that it would have led to the discovery of other admissible evidence. The better reading of *Wood* is that this Court rejected the defense's claim because it was "based on mere speculation" (516 U.S. at 6), not merely because the polygraph exam could not have been admitted at trial. But "[r]eactions to *Wood* have been as varied as pre-*Wood* jurisprudence." *Felder v. Johnson*, 180 F.3d 206, 212 n.7 (5th Cir. 1999).

To be sure, this case arises in a slightly different factual context than those giving rise to this circuit

conflict. Here, the Florida Supreme Court did not hold that the forms were immaterial because they were inadmissible. Instead, it reasoned that the forms would not have persuaded the jury. But its logic was the same: the Florida Supreme Court construed *Brady* to deem relevant to the materiality inquiry only the effect of the suppressed forms themselves, as opposed to other evidence that the forms would have revealed; other courts similarly hold that evidence is immaterial because it could not have been presented to the jury at all. The better-reasoned opinions of the majority of courts, by contrast, properly take a broader view of the materiality inquiry.

As a consequence, a ruling by this Court correctly rejecting the Florida Supreme Court's illogically narrow assessment of materiality would almost surely resolve the conflict. By holding that the *Brady* determination must account for the persuasive effect of the non-Sweet trial evidence, the Court would establish that materiality is not limited merely to the precise evidence suppressed by the police but also extends more broadly to the effect of the suppression on the discovery of other evidence that the jury would find relevant.

5. Certiorari is also warranted because this case is an ideal vehicle in which to resolve the question presented. The Florida Supreme Court rejected petitioner's argument that the non-Sweet trial evidence was relevant to his *Brady* claim as a matter of law, not fact. Petitioner accordingly does not ask this Court to resolve the ultimate question of the evidence's materiality; that issue instead is properly left to be decided on remand. This Court need only

decide the frequently recurring, purely legal question of whether the government's duty of disclosure under *Brady* is triggered only if the evidence in question would itself be persuasive to the jury.

Further proceedings on remand would illuminate other important issues in the case. The lower courts must address the effect of the suppression on the erroneous deadlock instruction, an area in which one commentator has rightly noted that the law "can be generously characterized as complex and inconsistent [and] less charitably described as incoherent." Thomas & Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill of Rights J. 893, 904 (2007). There is a substantial basis for concluding that the trial court's conduct contravened the principle that "[a]ny criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). *Cf. Quercia v. United States*, 289 U.S. 466, 470 (1933) (a judge "may analyze and dissect the evidence, but he may not either distort it or add to it").

Petitioner's claim to relief is moreover substantial, such that there is a genuine prospect that the Florida Supreme Court would reach a different result on remand. The jury's determination that petitioner was guilty was obviously a close one. The evidence against petitioner consisted almost entirely of the self-interested claims of the crime's mastermind, presented only in exchange for prosecutorial immunity. None of the crime scene evidence was made available to the defense or presented to the jury. Petitioner was alleged to have

fled in Von Maxcy's car, but there was no blood in the car; latent fingerprints in the car did not match Kelley's and were never identified.

Petitioner's first trial ended in a hung jury. The second jury was hung as well, until the judge broke the deadlock by advising the jurors erroneously that no further evidence existed. The jury divided again in recommending that Kelley be sentenced to death. A federal district court subsequently threw out the verdict after finding that the prosecution suppressed additional significant evidence. There is accordingly no basis for dismissing petitioner's *Brady* claim on the ground that it plainly would have had no effect on the outcome of the case. *See Kyles*, 514 U.S. at 455 (Stevens, J., concurring) (grant of certiorari is particularly appropriate where, as here, "the fact that the jury was unable to reach a verdict at the conclusion of [Kelley's] first trial provides strong reason to believe the significant errors at the second trial were prejudicial").

It is furthermore essential that this Court grant certiorari on direct review. After the Florida Supreme Court issued its decision, the Eleventh Circuit rejected petitioner's request for permission to file a second or successive habeas petition raising his *Brady* claim arising from the suppression of the evidence disposition forms. Any subsequent attempt by petitioner to present this issue on federal habeas corpus would accordingly face a significant objection by respondent that further review is precluded.[1]

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[1] In reaffirming that petitioner could not raise again his failed claim that the prosecution "destroyed evidence," the

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 10, 2009

Florida Supreme Court noted that the Sweet trial evidence "was destroyed by court order in 1976" and that "none of the requested items were located" thirty years later in 2006 when petitioner sought them for DNA testing. Pet. App. 19a. By contrast, petitioner's distinct claim that prosecutors suppressed evidence in violation of Brady involves his allegation that the non-Sweet trial evidence was available at the time of petitioner's trials in the 1980s.

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. CR81-0535

STATE OF FLORIDA,
Plaintiff,

vs.

WILLIAM HAROLD KELLEY,
Defendant.
_____/

ORDER DENYING MOTION FOR
POSTCONVICTION RELIEF

This matter came before the Court for consideration of William Harold Kelley's Motion for Postconviction Relief, filed May 9, 2007, pursuant to Florida Rule of Criminal Procedure 3.851. After reviewing the Motion, file, and record, together with the State's Response, filed May 30, 2007; Mr. Kelley's Notice of Factual Error in State's Response, filed June 28, 2007; the State's Response to Notice of Factual Error, filed July 9, 2007; and Mr. Kelley's Reply, filed September 18, 2007, the Court finds as follows.

The lengthy procedural history of this case is set forth in detail in this Court's Order Denying Motion for Postconviction DNA Evidence Testing, dated

June 29, 2006, and incorporated by reference herein. The Florida Supreme Court affirmed; *Kelley v. State*, 32 Fla. L. Weekly D675 (Fla. October 25, 2007).

Mr. Kelley now asks the Court to vacate his convictions, set aside his death sentence, and grant other relief as appropriate, based on the State's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and related prosecutorial misconduct that deprived him of a fair trial. Specifically, he alleges that in a May 10, 2006, letter from Assistant State Attorney Victoria Avalon, he and his lawyers learned for "the first time in the history of this case" that in 1966 and 1967, the Florida Sheriff's Bureau Crime Laboratory returned over 30 pieces of physical evidence to certain officers[1] of the submitting authorities. He argues the State had never revealed the fact that the evidence was returned, which meant that prior to his trial in 1984, he was deprived of the opportunity to determine what those specific individuals did with said evidence. He further argues he and his lawyers were left to assume the evidence had been destroyed, which affected the defense strategy, the charge given to jury when it deadlocked, and the framing of issues during direct appeal and postconviction proceedings.

In his Motion for Postconviction DNA Testing, Mr. Kelley acknowledged that certain physical evidence gathered from the crime scene had been

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[1] R. Trulock, Robert E. McCory, Don Bragg, Broward Coker, and a fifth person whose initials appear on the supporting documentation attached to the May 10, 2006 letter.

destroyed pursuant to a court order entered nearly a decade before his conviction, but contended that evidence "constituted a very small subset of the total universe of physical evidence gathered from the crime scene." He now alleges there has never been an evidentiary finding that the other items of physical evidence were actually destroyed prior to his trial.[2]

The State argues that Mr. Kelley's *Brady* claim is procedurally barred, facially insufficient, and refuted by the record. This Court concurs with the arguments set forth in the State's Response,[3] and makes the following findings of fact and conclusions of law.

Prior to Mr. Kelley's 1984 trial, there was a hearing on his motion to bar the prosecution due to the destruction of physical evidence, as well as his motion to dismiss the indictment due to pre-indictment delay, but both motions were denied. Testimony indicated that the evidence consisted of the State's exhibits admitted in John Sweet's trials.[4] An assistant state attorney noted that he had asked for permission to destroy the evidence because the

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[2] At the conclusion of the hearing on the Motion for Postconviction DNA Testing, this Court concluded that no evidence remained in existence; thus, it denied the Motion because there was no evidence to test.

[3] The State concedes error in its original assertion that Mr. Kelley did not make a public records request to FDLE.

[4] Copies of documentary exhibits were preserved and provided to the defense.

clerk's office did not have sufficient storage space for it. *See* 1984 trial transcript (Kelley II), pages 46-105. On appeal, Mr. Kelley challenged the refusal to dismiss the case based on the delay and loss of evidence; a supplemental appellate brief more particularly identified the real evidence as "hair samples, fingernail scrapings, blood samples and scrapings, carpet sections, a brake pedal and floor mat from the victim's car, the victim's clothing, a bloodstained sheet alleged to have covered the victim, bullets, and other items." *Kelley* DNA 1074, 1085-1089.

The Florida Supreme Court affirmed, finding no error:

> Appellant argues that the state's intentional destruction of the evidence of Maxcy's killing over five years before his indictment for a murder committed in 1966 so violated his due process rights that his indictment should have been dismissed. While recognizing that serious constitutional rights are involved in this question, and that the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness, we cannot agree that in this case appellant's due process rights have been violated. . . .
>
> While we find the destruction of the evidence in this case unfortunate, we cannot read the facts as even hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to condone the state's behavior here, we find no

> negligence in its actions. Obviously, the state had insufficient evidence to proceed against appellant until Sweet offered his testimony in 1981. The destruction of the evidence took place nearly nine and a half years after the state's fruitless efforts to convict Sweet, and five years before appellant's indictment. . . .
>
> The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

Kelley v. State, 486 So. 2d 578, 580-582 (Fla.), *cert. denied*, 479 U.S. 871 (1986).

In his Motion to Vacate filed in 1987, Mr. Kelley alleged that crime scene evidence from Mr. Sweet's trial had been destroyed and that counsel was ineffective for failing to adequately investigate the destruction. After an evidentiary hearing conducted in July 1988, Mr. Kelley's attorneys asked for additional time to investigate because they were not convinced the evidence no longer existed. The Court denied this request, as well as postconviction relief, and again, the Florida Supreme Court affirmed:

> Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior

appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the destruction of the evidence in question did not prejudice Kelley's case.

Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial **counsel admitted knowing that the fruits of the police investigation had been destroyed.** The state was not at fault in the destruction of the evidence. *Kelley*, 486 So. 2d at 581. The destruction of evidence in this case did not deprive Kelley of due process of law. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence

> does not constitute a denial of due process). (emphasis added)

Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990). Significantly, this opinion found no merit to Mr. Kelley's claim that the destruction of evidence prior to his trial deprived him of his constitutional rights.

Mr. Kelley's current claim appears to be merely a variation of his previous challenges to the destruction of evidence. The distinguishing feature is that this claim relates to evidence disposition forms reflecting that evidence submitted to the Florida Sheriffs Bureau (predecessor to FDLE) at the time of the murder in 1966 were returned to the Highlands County Sheriff's Office in 1966 and 1967.

Although Mr. Kelley claims he just learned of the return of the evidence, he cannot justify his failure to discover this previously. This Court disagrees with the argument that the State's purported failure to disclose the evidence return forms forced Mr. Kelley's attorneys to assume that all of the evidence had been destroyed. It is not reasonable to "assume" anything while investigating and defending a capital case.

Mr. Kelley has already challenged his trial counsel's performance in this regard. In his original postconviction proceeding, he alleged, inter alia, that attorneys Jack Edmund and Bill Kunstler were ineffective for failing to adequately investigate the destruction of the evidence. At the conclusion of the 1987 evidentiary hearing, the Court found that lack of diligence on the part of Mr. Kelley's collateral

counsel precluded the granting of additional time to investigate what had happened to this evidence. Thus, it appears the forms could have been discovered prior to those original postconviction proceedings, and the Court is reluctant to make a contrary finding at this late date.

Mr. Kelley argues, and the State concedes, that trial counsel did make a timely request for records to FDLE, yet never received the specific forms, which form the basis of the instant Motion. Therefore, the Court will accept the assertion that he did not know of the existence of these forms until he received Ms. Avalon's May 2006 letter, thus disposing of the need to further litigate the "due diligence" issue.

However, nothing that has been argued or introduced so far changes the conclusion that the evidence was destroyed prior to Mr. Kelley's 1984 trial. Even if the disposition forms document the fact that certain evidence was returned to the Highlands County Sheriff's Office in 1966 and 1967, that does not mean it was available during trial preparation in the early 1980's or that there was any basis whatsoever to have raised different arguments and defenses at trial based on its destruction, beyond those which were introduced and argued at length.

This Court finds no legal basis has been established for a *Brady* violation. Mr. Kelley has not shown that the State suppressed exculpatory or impeaching evidence, which resulted in prejudice. He can only speculate that his trial attorneys were unaware the evidence was returned to the sheriff in 1966 and 1967, and this is unlikely, given the fact

that they were in possession of the Sweet trial transcript, wherein the chain of custody of the evidence was outlined and established. *See* Exhibit A, attached to the State's response. If defense counsel was aware of this information, it cannot be said that the State suppressed it.

Perhaps more significantly, there is no reasonable probability that there would have been a different result at trial if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial. The fact that crime scene evidence was returned to the sheriff in 1966 and 1967 is not exculpatory or impeaching in any way. Furthermore, there is no reasonable probability that the forms would have led to the discovery of the actual crime scene evidence, which was destroyed prior to trial. Finally, the information contained on the forms was simply not material to the case. Therefore, Mr. Kelley's *Brady* claim must fail.

This Court concludes that Mr. Kelley has failed to state a prima facie claim for relief and therefore, no evidentiary hearing is warranted in this case.

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Motion for Postconviction Relief is hereby DENIED.

2. The State's Response, Mr. Kelley's Notice of Factual Error, the State's Response to Notice of Factual Error, and Mr. Kelley's Reply are incorporated into this Order by reference.

3. Mr. Kelley is advised that he may file a Notice of Appeal in writing within thirty (30) days from the date of rendition of this Order.

4. The Clerk of Court shall promptly serve a copy of this Order upon Mr. Kelley's attorneys, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 20th Day of December, 2007.

/s/ Belvin Perry, Jr.
Belvin Perry, Jr.
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Motion for Postconviction Relief has been provided this 20th day of November 2007, to the following:

– Kevin J. Napper, Carlton Fields P.A., Corporate Center Three at International Plaza, 4221 West Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5736 (counsel for Mr. Kelley)

– Victoria J. Avalon, Assistant State Attorney, Post Office Box 9000, Drawer SA, Bartow, Florida 33831-9000

– Carol M. Dittmar, Senior Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013/

/s/Jill Gay
Judicial Assistant

APPENDIX B

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT, IN AND
FOR HIGHLANDS COUNTY, FLORIDA

CASE NO. CR81-0535

STATE OF FLORIDA,
Plaintiff,

vs.

WILLIAM HAROLD KELLEY,
Defendant.

_____/

ORDER DENYING MOTION FOR REHEARING

This matter came before the Court for consideration of William Harold Kelley's Motion for Rehearing, filed January 4, 2008, pursuant to Florida Rule of Criminal Procedure 3.851(f)(7). After reviewing the Motion, file, and record, together with the State's Response, filed January 15, 2008, the Court finds as follows.

The issue that Mr. Kelley contends this Court has overlooked or misapprehended is his contention that "there has never been a factual determination by a trial court that all of the fruits of the prosecution's investigation of the crime scene were destroyed prior

to Mr. Kelley's trial." However, this Court agrees with the State that the status of the physical evidence in 1984 has no bearing on the claim of newly discovered evidence – specifically, evidence disposition forms showing that certain items were returned to law enforcement agencies in 1966 and 1967 – which forms the basis of the underlying successive Motion for Postconviction Relief. This Court has determined that the disposition forms do not entitle Mr. Kelley to postconviction relief, and finds no basis to change that conclusion.

Mr. Kelley has already challenged the lack of a specific factual finding regarding the status of the evidence at the time of his 1984 trial, without success. Most recently, he raised the argument in his 2007 Motion for Postconviction DNA Testing. In ruling on that Motion, this Court noted that in his 1987 Motion to Vacate, he alleged that crime scene evidence from Mr. Sweet's trial had been destroyed and that counsel was ineffective for failing to adequately investigate the destruction. Although counsel continued to assert that sonic evidence remained in existence, the Florida Supreme Court noted: "in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed." *Kelley v. State*, 486 So. 2d 578, 581 (Fla.), *cert. denied*, 479 U.S. 871 (1986). Again, the argument does not establish a valid basis for granting rehearing.

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Motion for Rehearing is hereby DENIED.

2. Mr. Kelley is advised that he may file a Notice of Appeal in writing within thirty (30) days from the date of rendition of this Order.

3. The Clerk of Court shall promptly serve a copy of this Order upon Mr. Kelley's attorneys, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 28th day of January 2008.

/s/ Belvin Perry, Jr.
Belvin Perry, Jr.
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Motion for Reharing has been provided this ____ day of January 2008 to the following:

– Kevin J. Napper, Carlton Fields P.A., Corporate Center Three at International Plaza, 4221 West Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5736 (counsel for Mr. Kelley)

– Victoria J. Avalon, Assistant State Attorney, Post Office Box 9000, Drawer SA, Bartow, Florida 33831-9000

– Carol M. Dittmar, Senior Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013/

/s/A. Palmer
Staff Attorney

APPENDIX C

Supreme Court of Florida.
William H. KELLEY, Appellant,

v.

STATE of Florida, Appellee.
William H. Kelley, Petitioner,

v.

Walter A. McNeil, etc., Respondent.
Nos. SC08-608, SC08-1083.

Jan. 22, 2009.

PER CURIAM.

Kelley appeals a trial court order denying his successive postconviction motion filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus.[5] For the reasons explained below, we affirm the trial court's order and deny the habeas petition.

I. BACKGROUND

In 1984, William Harold Kelley was convicted and sentenced to death for the 1966 first-degree murder of Charles Von Maxcy. This Court affirmed Kelley's conviction and sentence on direct appeal. *Kelley v. State*, 486 So. 2d 578 (Fla. 1986). Additionally, we affirmed the denial of Kelley's first postconviction

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[5] We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

motion and denied his petition for a writ of habeas corpus. *Kelley v. State*, 569 So. 2d 754 (Fla. 1990); *Kelley v. Dugger*, 597 So. 2d 262 (Fla. 1992). This Court most recently set forth the specific facts of this contract killing when affirming the trial court's denial of postconviction DNA testing. *See Kelley v. State*, 974 So. 2d 1047 (Fla. 2007).

Originally, only John Sweet, who commissioned Kelley to commit the murder, was tried for Maxcy's murder. *Kelley*, 974 So. 2d at 1048. In 1976, several years after the prosecution of Sweet proved unsuccessful, the physical evidence from the Sweet trial was destroyed pursuant to court order. *Id.* After the evidence was destroyed, Kelley was indicted and tried for Maxcy's murder based upon Sweet's testimony. *Id.* However, the issue of destroyed evidence has remained a constant over the course of Kelley's trial, direct appeal, and postconviction proceedings. *See Kelley*, 486 So. 2d at 580-82; *Kelley*, 569 So. 2d at 756; *Kelley*, 974 So. 2d at 1051-52.

In this successive postconviction motion, Kelley alleges that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose evidence disposition forms which indicate that, in 1966 and 1967, certain evidence was transported from the Florida Sheriff's Bureau Crime Laboratory in Tallahassee back to the submitting agency after laboratory examination. The trial court denied relief, and Kelley appeals. Additionally, Kelley petitions this Court for a writ of habeas corpus, claiming that a manifest injustice occurred because evidence was destroyed prior to Kelley's trial.

II. ANALYSIS

In his *Brady* claim, Kelley maintains that the State's failure to disclose the evidence disposition forms necessitates a new trial because the forms would have led to the discovery of evidence that would have been both exculpatory and impeaching. Kelley also argues that the trial court erred in failing to hold an evidentiary hearing on this *Brady* claim. We disagree and affirm the trial court's denial of relief.

Brady requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti v. State*, 894 So. 2d 161, 168 (Fla. 2004). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence (2) was willfully or inadvertently suppressed by the State and, (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict. *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Way*, 760 So. 2d at 913 (emphasis omitted) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)); *see also Strickler*, 527 U.S. at 290, 119 S.Ct. 1936. When reviewing *Brady* claims, the Court gives deference to the trial court on findings of fact and reviews *de novo*

the application of law and independently reviews the cumulative effect of the suppressed evidence. *See id.*

"When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the [trial] court must look at the entire record." *Wright v. State*, 995 So. 2d 324, 328 (Fla. 2008). "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R.Crim. P. 3.851(f)(5)(B). And, because a trial court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. *See State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding that "pure questions of law" that are discernible from the record "are subject to de novo review").

Here, an evidentiary hearing on Kelley's *Brady* claim was not warranted because the record conclusively demonstrates that Kelley is not entitled to relief. Specifically, the record demonstrates that the evidence disposition forms at issue are neither favorable nor material. These forms memorialize the transfer of evidence from the Florida Sheriff's Bureau to local officials after laboratory testing. They do not exculpate or exonerate Kelley; the forms do not mention Kelley or implicate someone else. Likewise, they do not offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses. Furthermore, there is not a reasonable probability that, had the evidence

disposition forms been disclosed, the result of the proceedings would have been different. Our confidence in the outcome is not undermined. Accordingly, because the evidence disposition forms are not favorable to Kelley and because the State's failure to disclose them did not prejudice Kelley, no *Brady* violation occurred.

To the extent Kelley is seeking to use the evidence disposition forms to relitigate his prior claims regarding the destroyed evidence, he is procedurally barred from doing so. As this Court determined on direct appeal and in the appeal of the first postconviction motion, the destruction of evidence did not prejudice Kelley's case. *Kelley,* 486 So. 2d at 582; *Kelley,* 569 So. 2d at 756. Moreover, when affirming the denial of Kelley's postconviction DNA testing motion, this Court explained that the "evidence collected in the Sweet trials was destroyed by court order in 1976 . . . . [A]s testified to by the nine witnesses, none of the requested items were located despite a diligent search." *Kelley,* 974 So. 2d at 1051. Thus, we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search.

Finally, in his habeas petition, Kelley alleges that (1) there has never been an evidentiary finding that all the physical evidence was destroyed prior to his trial; (2) appellate counsel was ineffective in stating that the evidence had been destroyed; and (3) the State intentionally suppressed or destroyed material

evidence which prejudiced his defense. However, these habeas claims are procedurally barred. *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion.") (quoting *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)).

As explained above, this Court previously stated that the evidence was destroyed in 1976 prior to Kelley's trial and that Kelley was not prejudiced by the destruction of the evidence. Additionally, Kelley's claim of ineffective assistance of appellate counsel is simply a variation of the claim of ineffective assistance of trial counsel raised in Kelley's first postconviction motion. Both claims rely on the same set of facts, including that appellate counsel submitted affidavits from trial counsel indicating they knew that all of the evidence had been destroyed prior to Kelley's trial. Therefore, Kelley's habeas claims are procedurally barred.

III. CONCLUSION

In light of the above, we affirm the trial court's denial of Kelley's successive postconviction motion, and we deny Kelley's petition for a writ of habeas corpus.

It is so ordered.

WELLS, PARIENTE, LEWIS, CANADY, and POLSTON, JJ., and ANSTEAD, Senior Justice, concur.
QUINCE, C.J., recused.

APPENDIX D

Supreme Court of Florida

WEDNESDAY, FEBRUARY 25, 2009

CASE NOS.: SC08-608; SC08-1083
Lower Tribunal No(s).: CR81-535

WILLIAM H. KELLEY vs. STATE OF FLORIDA

WILLIAM H. KELLEY vs. WALTER A. MCNEIL, ETC.

Appellant/Petitioner Appellee/Respondent

Appellant/Petitioner's Motion for Rehearing or Clarification is hereby denied.

WELLS, PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.
LABARGA, J., did not participate.
QUINCE, C.J., recused.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

HON. BELVIN PERRY, JR., CHIEF JUDGE
VICTORIA AVALON
JOSEPH HAGEDORN LANG, JR.

SYLVIA H. WALBOLT
KEVIN JON NAPPER
LESLIE SCHULTZ-KIN

140

(2)

Supreme Court, U.S.
FILED
SEP 10 2009
OFFICE OF THE CLERK

Case No. 09-53

IN THE UNITED STATES SUPREME COURT

WILLIAM HAROLD KELLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should exercise its certiorari jurisdiction to review the denial of a claim under Brady v. Maryland, 373 U.S. 83 (1963), where the ruling does not conflict with any other court opinion or address any unsettled question of federal law?

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STATEMENT OF THE CASE AND FACTS

This petition seeks review of an opinion of the Florida Supreme Court denying relief requested pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Petitioner, William Kelley, is currently incarcerated on Florida's death row, sentenced in 1984 following his conviction for first degree murder in the 1966 death of wealthy citrus farmer Charles Von Maxcy. Kelley v. State, 486 So. 2d 578, 579-80 (Fla.), cert. denied, 479 U.S. 871 (1986). This Court has denied certiorari review of this case on two prior occasions: following his direct appeal, when Kelley challenged the Florida Supreme Court's opinion that his due process rights were violated when the State destroyed evidence prior to trial, Kelley v. Florida, 479 U.S. 871 (1986); and again following the Eleventh Circuit Court of Appeals opinion reversing the granting of habeas corpus relief by the United States District Court for the Southern District of Florida, Kelley v. Crosby, 545 U.S. 1149 (2005).

Respondent disagrees with the Statement of the Case included in the certiorari petition as filed, which outlines both the procedural history and the factual background of Kelley's prosecution for the Maxcy murder. Among this recitation are several improper inferences and a few critical omissions, resulting in a Statement biased in Kelley's favor. For example, the Statement suggests that Kelley's trial attorneys were not aware that there was evidence collected from the crime scenes, tested by the Florida Sheriff's Bureau (FSB) in 1966 and 1967, then returned to the submitting agency, the Highlands County Sheriff's Office (HCSO). However, it is

undisputed that Kelley's attorneys had a copy of a transcript from Sweet's trial, which described the evidence that had been collected, outlined the chain of custody for the evidence that was submitted to the FSB and then returned to the HCSO, and identified the specific items of evidence which were admitted against John Sweet at his trial. In addition, this is a matter of routine procedure in Florida investigations, and at least Kelley's local attorney, an experienced criminal defense attorney, would have been familiar with this procedure. Furthermore, one of the witnesses at the postconviction evidentiary hearing testified that the evidence in this case had been returned from the lab after testing to the local sheriff's office.

Also, in the initial state court postconviction proceedings, Kelley's trial attorneys testified that they had investigated the destruction of all of the evidence prior to trial, and had learned that the State had not only destroyed the evidence which had been admitted at Sweet's trial, but had also destroyed the evidence which had been collected from the crime scenes but not admitted against Sweet (which the petition refers to as "non-Sweet crime evidence"). Both of Kelley's trial attorneys are now deceased.

Kelley's Statement of the Case is also written in a confusing manner which, rather than simply stating the facts, offers questionable conclusions and focuses more on what was not asserted in prior litigation. Kelley attempts to portray the State in a bad light, by accusing the State of failing to make arguments previously which the State would have no reason to make. For example, Kelley asserts that, in responding to the claim of evidence destruction in

Kelley's direct appeal, the State "did not advise Kelley or the court that the non-Sweet crime scene evidence had not actually been destroyed pursuant to the 1976 court order because it had instead remained in the possession of the submitted authorities" (Petition, p. 6). However, there is no basis to believe that any of this evidence still existed after the 1976 destruction order. Kelley now claims that this "non-Sweet" evidence existed after 1976 and through the time of his 1984 trial, which is the basis of his claim that the trial court's instruction to the jury that there was no additional evidence to be considered was erroneous. There is, however, absolutely no evidence to support his new personal belief that this evidence existed after the Sweet evidence was destroyed in 1976.

Kelley also takes great liberties with offering facts as to his knowledge about the evidence in his case. For example, he asserts that he filed his 2007 Brady claim for postconviction relief "having finally been told by the State for the first time that much of the crime scene evidence had *not* been included within the materials permitted to be destroyed in 1976 under the court order" (Petition, p. 10-11) (emphasis in original). Apparently Kelley feels that he was "told" the evidence still existed after 1976 by the disclosure of these "evidence disposition forms," which offered no clue as to whether the evidence existed after 1976 but merely memorialized that the evidence was returned from FSB to HCSO in 1966 and 1967. Although the State provided the forms, the State has not "told" Kelley or otherwise taken the position that this non-Sweet evidence still existed after 1976.

For these reasons, Respondent does not agree to the Statement of the Case recited in the Petition, and offers the following factual background, beginning with the facts as noted by the Florida Supreme Court in Kelley's direct appeal:

> Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.
>
> John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.
>
> Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Kelley, 486 So. 2d at 579-580.

Following the reversal of Sweet's conviction, the State's inability to proceed against him resulted in his discharge on speedy trial grounds in 1971. In 1976, the State of Florida petitioned the court and obtained permission to destroy the physical evidence which had been admitted during Sweet's trials. Sweet ultimately returned to Massachusetts and, in 1981, approached authorities there regarding criminal activity taking place in that state. With Sweet's cooperation, Florida officials obtained an indictment against Kelley for Maxcy's murder in December 1981. At that time, Kelley was "on the run" from the law and sought as a fugitive. Kelley was apprehended in Tampa, Florida, on June 16, 1983.

The principal witness against Kelley was John Sweet, who identified Kelley as one of two men that Sweet had hired to kill Maxcy. According to Sweet, the hit men stayed at a hotel in Daytona, and met him at a shopping center in Sebring on the day of the murder. Sweet drove the men to Maxcy's home in their car and dropped them off, telling them the front door was unlocked and Maxcy would be home shortly. He returned their car to the shopping center parking lot, picked up his own car, and drove around for a while until he saw Maxcy's car parked at the shopping center, signaling the mission had been accomplished. A great deal of evidence was presented to corroborate Sweet's testimony as to Maxcy's murder, including bank records, phone records, car rental and hotel records.

A deputy testified that fingerprints were lifted from the crime scene and from Maxcy's car, but that, to his knowledge, the prints were never identified.

Several crime scene photographs were admitted, showing a great deal of blood in the Maxcy house. Investigator Murdock testified, however, that no blood was found in Maxcy's abandoned car, a point emphasized in the defense closing argument.

The jury convicted Kelley and, following a penalty phase, recommended that the death sentence be imposed. Judge Bentley followed the jury's recommendation and imposed a sentence of death on April 2, 1984.

On appeal, Kelley challenged the trial court's refusal to dismiss the case based on the delay and loss of evidence. In a supplemental brief, Kelley asserted the destroyed evidence included, "hair samples, fingernail scrapings, blood samples and scrapings, carpet sections, a brake pedal and floor mat from the victim's car, the victim's clothing, a blood stained sheet alleged to have covered the victim, bullets, and other items." The Florida Supreme Court denied relief and affirmed the conviction and sentence imposed. Kelley, 486 So. 2d at 582, 586.

State postconviction proceedings were initiated when Kelley filed a motion to vacate on November 20, 1987. The motion alleged that crime scene evidence, in addition to that evidence known to have been destroyed pursuant to court order from Sweet's trial, had been destroyed. This claim was rejected as procedurally barred. Another claim, asserting that Kelley's trial attorneys provided ineffective assistance of counsel by failing to adequately investigate the destruction of the evidence, was litigated at an evidentiary hearing in July, 1988.

Kelley alleged that counsel were deficient regarding the destruction of evidence admitted at Sweet's trials, as well as other evidence collected during the investigation.

The motion to vacate offered sworn affidavits from both of Kelley's trial attorneys, specifically stating: "In preparing for the trial of William Kelley, it became clear at some point that evidence from the Sweet trial as well as the fruits of the police investigation in the case had been destroyed." These affidavits were admitted as substantive evidence during the postconviction hearing.

The postconviction motion was denied, a ruling which was affirmed on appeal. Kelley v. State, 569 So. 2d 754 (Fla. 1990). Judge Bentley's extensive factual findings were adopted and incorporated into the appellate opinion, which addressed the destruction of crime scene evidence claim as follows:

> Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the destruction of the evidence in question did not prejudice Kelley's case.

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed. The state was not at fault in the destruction of the evidence. Kelley, 486 So.2d at 581. The destruction of evidence in this case did not deprive Kelley of due process of law. See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Kelley, 569 So. 2d at 756. The Florida Supreme Court also denied a petition for writ of habeas corpus, which alleged that Kelley's appellate attorneys had rendered ineffective assistance in his direct appeal. Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992).

Kelley then filed a federal petition for writ of habeas corpus in the United States District Court, Southern District of Florida, asserting six issues, including a challenge to the destruction of all of the physical evidence - that admitted at Sweet's trial as well as other fruits of the police investigation. The

district court issued an Order granting habeas relief pursuant to Brady v. Maryland, 373 U.S. 83 (1963), on September 19, 2001, followed by an Order of December 30, 2001, finding that Kelley's trial attorneys provided ineffective assistance of counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325 (S.D. Fla. 2002). The Dec. 30 Order also denied Kelley's claim on the destruction of evidence. Id., at 1329-31.

On appeal, the Eleventh Circuit rendered an extensive opinion reversing the grant of habeas relief, and reinstating Kelley's conviction and sentence. Kelley v. Secretary of the Department of Corrections, 377 F.3d 1317 (11th Cir. 2004). The Eleventh Circuit characterized the district court as "naive," [377 F.3d at 1340], flawed by a "hasty assumption," [377 F.3d at 1341], and "odd," [377 F.3d at 1347, n.30], finding it "obvious" that the district court was confused on the facts [377 F.3d at 1359], finding the district court's conclusion on one issue "strains credulity," "is preposterous," and contrary to the record before the district court [377 F.3d at 1359]. The Eleventh Circuit concluded that the district court committed clear error on a number of levels: by conducting a second evidentiary hearing in federal court; by granting relief on a procedurally barred claim which had never been exhausted in state court (and expressing "serious skepticism" as to whether relief could have been granted on the merits, even if the claim had been properly exhausted, see 377 F.3d at 1351); and by granting relief on a Brady claim which should have been rejected on its merits, as it had been in state court. Kelley, 377 F.3d at 1340, 1343, 1354, 1369. Kelley sought certiorari review in this Court, which was denied on June 27, 2005.

Kelley v. Crosby, 545 U.S. 1149 (2005).

Kelley filed a successive state habeas petition in the Florida Supreme Court in October, 2003, presenting a claim for relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). The petition was denied on May 4, 2004. Kelley v. Crosby, 874 So. 2d 1192 (Fla. 2004).

Thereafter, Kelley filed a motion seeking postconviction DNA testing on twenty-nine items of evidence which had been collected during the investigation, but not admitted at Sweet's trial. The circuit court denied the motion following an evidentiary hearing, specifically finding that the evidence sought to be tested no longer existed. The Florida Supreme Court's opinion affirming the denial of Kelley's DNA motion set forth the testimony presented at the evidentiary hearing:

> At the evidentiary hearing on June 6, 2006, ten witnesses testified. The first nine testified regarding their efforts to locate the evidence Kelley was seeking. These witnesses, after diligent searches, were unable to locate any of the requested items. First, Tina Barber, records custodian for the Highlands County Sheriff's Office, was unable to find any evidence in her office relating to Kelley's case. She found only a letter stating that older receipts were turned over to the attorneys in Bartow. Cecilia High, supervisor of property and evidence at the Highlands County Sheriff's Office, searched the property storage facility but could not find anything. Dr. Marta Coburn, chief medical examiner for Collier

County, found nothing. Sheli Wilson, the District 10 medical examiner's office manager, and her staff searched but found nothing related to Von Maxcy's death. Suzanne Livingston, forensic services director for the Florida Department of Law Enforcement (FDLE), found four disposition forms in the case files indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office, but found none of the requested evidence. Judy Bachman, Director of Criminal Court Services for the Highlands County Clerk of Courts, found evidence relating to Kelley's case, including a sealed envelope containing poster boards, photos, hotel receipts, and paper evidence introduced as exhibits in Kelley's first trial. She also found an order releasing some evidence in a related case, but she found none of the items requested. John King, special agent supervisor for the FDLE Sebring office, searched inventory and files but found nothing. Terry Wolfe, Tenth Judicial Circuit State Attorney investigator, searched both the Sebring and Bartow evidence lockers and found nothing. Sebring Assistant State Attorney Steve Houchin retrieved the boxes of case files for this case from the Sebring file room and delivered them to Wolfe to deliver to Assistant State Attorney Victoria Avalon, who represented the State in this proceeding. Houchin confirmed that there were no other files from this case in the file room. He noted that the state attorney does not keep items of

> evidence; items that are not admitted at trial are retained by the local investigating agency.
>
> The final witness was Dr. Martin Tracey, professor of biological studies at Florida International University. He testified as Kelley's expert witness in the area of population genetics. Dr. Tracey discussed the ability of DNA testing to identify an individual to nearly a one hundred percent degree of certainty.

Kelley v. State, 974 So. 2d 1047, 1048-50 (Fla. 2007).

Suzanne Livingston testified at the hearing that, in investigating the request for DNA testing, she located the case files and found disposition forms indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office. She noted that the Florida Sheriff's Bureau was the predecessor to FDLE and that the policy in 1966, as it still is today, was to not retain any evidence but return everything to the submitting agency once their lab analysis was complete.

While the DNA appeal was pending in the Florida Supreme Court, Kelley's attorneys filed a successive postconviction motion which claimed that the FSB disposition forms had been withheld from the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). The court summarily denied the successive motion, finding it "unlikely" that Kelley's trial attorneys were not aware of the information on the evidence disposition forms (Pet. App. 8a-9a), and finding that the information on the forms was "not exculpatory or impeaching in any way," (Pet. App. 9a). Most significant for Kelley's current petition, the court also

observed that "there is no reasonable probability that there would have been a different result at trial if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial," noting "there is no reasonable probability that the forms would have led to the discovery of the actual crime scene evidence, which was destroyed prior to trial" (Pet. App. 9a).

On appeal, the Florida Supreme Court affirmed this ruling, specifically reiterating "the record demonstrates that the evidence disposition forms at issue are neither favorable nor material" (Pet. App. 17a); Kelley v. State, 3 So. 3d 970, 973 (Fla. 2009). The court held that there was no reasonable probability of a different result had the forms been disclosed, and that the court's confidence in the outcome was not undermined (Pet. App. 17a-18a). In addition, the court noted its findings from the earlier DNA appeal, that evidence had been destroyed in 1976 and could not be located, despite a diligent search, concluding, "we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search" (Pet. App. 18a). The court also denied another state habeas petition, which disputed the court's prior findings that this evidence had been destroyed before Kelley's trial, finding the claim presented to be procedurally barred (Pet. App. 18a-19a).

This petition seeks review of that opinion.

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S CORRECT, FACT-SPECIFIC DENIAL OF RELIEF UNDER BRADY V. MARYLAND DOES NOT WARRANT EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION

Kelley asserts that this Court must exercise certiorari review in this case to resolve a split among circuit courts as to whether Brady v. Maryland, 373 U.S. 83 (1963), requires the suppressed evidence to be material and exculpatory or whether a Brady violation occurs when the evidence is not material or exculpatory but the defendant speculates, without any substantiation, that the suppressed information could lead to material, exculpatory evidence. Review must be denied for a number of reasons; as will be seen: (1) the opinion below did not conflict with any opinions from this Court; (2) the court below did not consider or analyze Kelley's current claims regarding circuit conflicts and the alleged circuit conflicts cited are not implicated in this case; and (3) the court below properly denied Kelley's fact-specific claim.

Kelley asserts initially that the Florida Supreme Court's denial of relief conflicts with Brady itself, with Kyles v. Whitley, 514 U.S. 419 (1995), with United States v. Bagley, 473 U.S. 667, 682 (1985), and with Wood v. Bartholomew, 516 U.S. 1 (1995), by applying a "narrow" construction of the Brady materiality standard; according to Kelley, the Florida Supreme Court rejected his claim of materiality based only on the finding that the forms themselves were not exculpatory or material, and refused to

consider or analyze Kelley's claim that the forms may have led to the discovery of the original crime scene evidence, including hair and fingernail scrapings. Kelley concludes that the court below erred in applying Brady: "the court should have determined (i) whether the evidence forms would have led Kelley's counsel to locate the non-Sweet trial evidence identified by the forms and (ii) what the effect of that evidence would have been on the jury" (Petition, pp. 18-19).

The first flaw in Kelley's plea for review is that the Florida Supreme Court did exactly what Kelley claims it should have done. The Court specifically considered whether the evidence disposition forms could have led to the discovery of any crime scene evidence and held, "we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search." Kelley, 3 So. 3d at 973; Pet. App. 18a. Clearly, as the opinion expressly indicates, the Florida court did not limit its analysis to the value of the forms themselves, but considered the effect that disclosure of the forms might have had on preparation of the defense.

There is no language in the opinion below which supports Kelley's claim that the court limited consideration of the alleged Brady forms to a "narrow" view of whether those particular documents alone could change the outcome of the trial proceedings. The court cited the correct standard, quoting Bagley and Strickler v. Greene, 527 U.S. 263 (1999). The court specifically observed that its

confidence in the outcome had not been undermined, and that there was no reasonable probability of a different result, had the forms been disclosed prior to trial.

To the extent that Kelley asserts that the decision below conflicts with Kyles because the Florida Supreme Court did not expressly consider the cumulative effect of other alleged Brady violations asserted in prior proceedings, no conflict exists because Kelley never requested that such an analysis be conducted. See Initial Brief of Appellant, Kelley v. State, Case No. SC08-608 (Resp. App. 1). In addition, no such analysis is necessary since the court found that the information was not exculpatory, and the trial court had found it was "unlikely" that Kelley's trial attorneys did not know this information prior to trial. No conflict with Brady or any other case from this Court can be discerned in the opinion below.

In asserting that certiorari review is necessary, Kelley submits that there is conflict between the federal circuits as to whether Brady is satisfied with a "narrow" review considering only the actual documents or materials that were not disclosed, or whether it requires a "broader" review which also considers the impact which disclosure of the documents or materials might have had on the defendant's ability to prepare for trial. He cites cases from the Second, Sixth, Seventh and Ninth Circuits, which "unambiguously take a broader view of the materiality inquiry" and, according to Kelley, thereby conflict with the opinion rendered below (Petition, p. 19). However, as explained above, the Florida Supreme Court also took the broader view,

specifically finding that the evidence forms could not have led to the discovery of crime scene evidence, since that evidence had been destroyed in 1976. Kelley does not cite any other cases which he claims take the impermissible narrow view, so if there is indeed conflict on this point, it is not demonstrated by Kelley's petition; the decision below does not conflict with any of the cases noted in the petition on this point.

Kelley also asserts that there is a related conflict, "that a ruling in this case would almost certainly resolve" regarding whether a viable Brady claim can be brought if the evidence alleged to have been withheld is itself inadmissible (Petition, p. 20). While the First Circuit appears to have recognized such a conflict in Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (en banc), again any possible conflict is not implicated on the facts of this case.[1] Kelley suggests that the Florida Supreme Court determined that the evidence disposition forms in this case were not admissible, and therefore concluded, without

---

[1] Kelley and the Ellsworth court identify a Fourth Circuit case, Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996), as a case which holds that Brady is not implicated by the failure to disclose evidence which is inadmissible. Hoke reversed a district court's decision to grant habeas relief under Brady; the court commented, in a footnote, that if the undisclosed statements were inadmissible, they may be "immaterial" under Brady, citing Wood v. Bartholomew. Id., at 1356. However, for purposes of its opinion, the court assumed that the statements would be admissible and it did not reject Brady on that basis. Whether Hoke or any other case conflicts with Wood is not relevant to Kelley's petition, since the Florida Supreme Court below did not offer any misunderstanding of Wood or any other case.

further analysis, that they could not be deemed to be exculpatory or material. While admissibility is often a factor strongly associated with materiality, the Florida Supreme Court did not make any finding as to the admissibility of these forms in denying relief. The trial court had, in fact, concluded that there was no reasonable probability of a different result "if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial" (Pet. App. 9a). Moreover, it is clear from other cases that the Florida Supreme Court does not feel constrained to limit Brady's application to only admissible evidence. See Mordenti v. State, 894 So. 2d 161, 173 (Fla. 2004) (granting a new trial under Brady where State failed to disclose information; "even if inadmissible it was, at a minimum, at least relevant information that would have led the defense to discover evidence for the impeachment of Gail;" concluding that, by withholding information, "the State precluded Mordenti from defending himself fully and fairly").

Since neither of the Florida state courts characterized the evidence forms in this case as inadmissible or limited the consideration of materiality to the question of admissibility, any split among the circuit courts as to whether a Brady claim may be premised on the failure to disclose documents which are not themselves admissible is not implicated in this case. To the extent that such a split exists, it would clearly not be resolved in a case where the challenged legal principle was not even noted or applied.

Despite Kelley's attempt to portray it differently, the Florida Supreme Court rejected Brady in this case after due consideration of all potential implications. The court below did not conclude that the evidence disposition forms were inadmissible and therefore no possible Brady claim could be brought; it instead analyzed the "withheld" documents at face value, and considered whether the forms could have led to the discovery of any other evidence, finding that they could not. Although Kelley now disputes the state courts' finding that even the non-Sweet evidence was destroyed years before his trial, he has no evidence contrary to this finding, which is clearly supported by the extensive record.

Finally, certiorari review should be denied in this case because the Florida Supreme Court applied the correct standard and reached the correct result. Even presuming that the hair, fingernail scrapings, and bloody carpet sample were still available to be found and used in his trial, no different outcome is possible, let alone probable. Kelley asserts that the jury would have rejected John Sweet's testimony if the defense could establish that the scene was very bloody while the car driven from the victim's home after the murder had no blood, but the jury was well aware that these were the facts; the defense made this same argument, supported by the testimony, during the trial. In addition, Kelley puts much on the court's instruction to the jury that there was no "more" or "clearer" evidence, but he has failed to demonstrate that any such evidence existed in 1984.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review: review is to be granted only for compelling reasons, such as when a decision conflicts with another opinion on an important legal principle or addresses an unsettled question of federal law. Kelley has clearly failed to demonstrate that any such compelling reasons exist for the granting of certiorari review in this case. Therefore, this Court must deny his pending petition for writ of certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Case No. 09-53

IN THE UNITED STATES SUPREME COURT

WILLIAM HAROLD KELLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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APPENDIX

IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY
Appellant,

v.

CASE NO.: SCO8-608
L.T. NO.: CR81-0535

STATE OF FLORIDA,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT WILLIAM HAROLD KELLEY

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PRELIMINARY STATEMENT

Appellant, William Harold Kelley, will be referred to as "Kelley." Appellee, the State of Florida, will be referred to as "the State."

The record on appeal is contained in three (3) volumes. Citations to the record are referred to as "Rx y-z," where "x" is the volume number and "y-z" are the page number(s) . Many of the record citations in this brief will be to the Joint Pretrial Stipulation of Facts filed by Kelley and the State in the federal habeas corpus proceeding. That Stipulation is found in this record at R2 263-79, and it in turn contains references back to the original state court records, as necessary.

As was the convention used by Kelley, the State, and the trial court below, references to Kelley's first trial transcript will be cited as "Kelley I [page number]," references to Kelley's second trial transcript will be cited as "Kelley II [page number]," references to the June 6, 2006 hearing in the Rule 3.853 DNA proceeding will be cited as "Kelley DNA [page number]," and references to the Record on Appeal in the Rule 3.853 DNA proceeding will be cited as "Kelley DNA ROA[volume] [page number]."

All emphasis in quotations has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

INTRODUCTION

William Kelley was indicted in 1981 and convicted in 1984 for the murder of Charles Von Maxcy in 1966. He has steadfastly maintained his innocence. One person who admitted to masterminding the murder, and another who admitted to participating in the murder, were granted immunity. In contrast, Kelley has spent nearly twenty-five years on Death Row. This case has reached this Court four prior times. See Kelley v. State, 974 So. 2d 1047 (Fla. 2007); Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992); Kelley v. State, 569 So. 2d 754 (Fla. 1990); Kelley v. State, 486 So. 2d 578 (Fla. 1986).

In 1976, on motion by the State made five years before Kelley was indicted, some of the physical crime scene evidence collected by the State during its 1966 investigation was destroyed pursuant to court order. [R2 305]. Although other physical evidence gathered during that investigation had been returned to other authorities, that fact was not made known to Kelley at that time. Consequently, his trial proceeded under the mistaken assumption that all of the physical evidence had been destroyed.

It was not until two years ago that the State for the first time advised Kelley, by letter dated May 10, 2006, that some of the crime scene evidence had been returned to four officers of the submitting authorities, who acknowledged receipt of the evidence. [R1 56, 63-67]. It is undisputed that the 1976 court order only authorized evidence held by the clerk of the court in the case of State of Florida v. John J. Sweet, Case No. 3002 (Fla. 10th Cir.) to be

destroyed and it did not authorize the destruction of this other crime scene evidence. [See R3 305-08]. Consequently, there is no reason to believe this evidence was destroyed when other evidence was destroyed in 1976 pursuant to that order.

To the contrary, under the presumption of regularity of business practices, which has been applied to public officials, that evidence is presumed to have existed at the time of Kelley's trial. The State has been inconsistent in its explanation as to what happened to that other evidence, saying at one point that the evidence was not accounted for, [R2 276 ¶98], but now saying it was "destroyed" prior to Kelley's 1984 trial. [R2 195]. The State has never explained, however, why, how, or exactly when the other evidence was purportedly destroyed. What is certain is that Kelley was not given information (i) about its return to investigating agencies in 1966 and 1967 or (ii) that it existed prior to his 1984 trial.

On May 9, 2007, Kelley filed a Florida Rule of Criminal Procedure 3.851(e) (2) motion contending that the State's failure to disclose any information about the existence of this evidence prior to his 1984 trial violated Brady v. Maryland, 373 U.S. 83 (1963) and otherwise constituted prosecutorial misconduct that violated his due process rights, warranting reversal of his conviction and vacation of his sentence. [R1 1-180]. The trial court summarily denied that motion, even though Kelley asserted that the motion required an evidentiary hearing. [R3 403-10]. This appeal followed. [R3 381-82].

A. The Death Of Charles Von Maxcy

The circumstances underlying this case began with an affair between John J. Sweet ("Sweet"), a career criminal, and Irene Maxcy ("Mrs. Maxcy"), the wife of Charles Von Maxcy. See Kelley v. State, 486 So. 2d at 579. The plan was that Sweet and Mrs. Maxcy would live on Mr. Maxcy's inheritance. Id. Sweet reached out to his contacts in Boston and negotiated a contract on Mr. Maxcy's life. Id. Mr. Maxcy was found murdered on October 3, 1966, when Mrs. Maxcy and a relative entered the Maxcy residence and found Mr. Maxcy dead on the bedroom floor. [Kelley II 461].

The police examined the crime scene, took several photographs, and collected physical evidence found at the scene. [Kelley II 478-484]. J.C. Murdock, a Deputy Sheriff at the time, participated in the immediate investigation of the crime scene. [Kelley II 477-478]. According to Deputy Murdock, a significant amount of blood was found in the bedroom and the hallway leading into the bedroom. [Kelley II 479, 493-494]. Deputy Murdock also testified, however, that no blood whatever was found in Mr. Maxcy's car (which the killers allegedly took after the crime), [Kelley II 496-497), despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [Kelley II 496].

Deputy Murdock further testified that investigators located Mr. Maxcy's car in a shopping center parking lot and examined it for evidence. [Kelley II 488]. Investigators found latent fingerprints inside the home and the car; the

fingerprints do not match to Kelley and were never identified. [Kelley II 488, 490, 492].

The physical crime scene evidence was collected and placed in the custody of the Highlands County Sheriff's Office. [Kelley II 479-481, 484, 495, 707]. Some of the physical evidence was later delivered to a laboratory in Tallahassee, Florida, for further analysis. Id.

"Because prosecutors found the evidence insufficient to proceed against [Kelley] and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried." Kelley v. State, 486 So. 2d 578, 579 (Fla. 1986).

B. Proceedings Against Sweet For The Crime

Sweet was tried twice for the first degree murder of Mr. Maxcy. Id. Sweet's first trial ended in a mistrial and his second trial ended in a conviction, which was then reversed on appeal. Id.; see Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970). "At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony." Kelley v. State, 486 So. 2d at 579. The loss of witness testimony was the result of Mrs. Maxcy's conviction for perjury during Sweet's trial. See Wells v. State, 270 So. 2d 399, 403 (Fla. 3d DCA 1972) (affirming Irene Maxcy's conviction for perjury based upon false statements made during the Sweet trial).

C. The Authorized Destruction Of Some Evidence In 1976

In April 1976, the State Attorney for Highlands County filed a "Petition for the Disposal of Evidence," requesting that the trial court authorize the destruction of certain specified evidence and exhibits from Sweet's trials that were then in the custody of the Clerk of Court. [R2 305]. On April 30, 1976, the Court granted the petition and ordered that the specified evidence be destroyed. [See R2 305-08)

That evidence consisted of a small amount of physical evidence recovered from the crime scene and a number of original documentary exhibits, including: (1) a bloody sheet with several rips in it; (2) a section of Mr. Maxcy's shirt; (3) a bullet recovered from the crime scene; (4) a tire belonging to Mr. Maxcy's car that had been slashed several weeks before the murder; (5) car rental agreements; (6) motel records; (7) telephone records; and (8) bank records. [R2 276 ¶96]. It is undisputed that the destruction Order did not encompass any of the other fruits of the prosecution's investigation that were not used in Sweet's trials. It is also undisputed that the Clerk would not have maintained any evidence that was not used in Sweet's trials, so an accidental destruction at that time as part of that Order would have been impossible. [See Kelley DNA 291]

D. Proceedings Against Kelley For The Crime

In 1981, nearly fifteen years after the murder, Sweet entered into negotiations with Massachusetts authorities to obtain immunity for a number of criminal activities he had been involved with there. [R2 263-64 ¶¶1-5]. Sweet in fact received immunity

in Massachusetts for breaking and entering, hijacking, larceny, arson, bribery, bookmaking, counterfeiting, and drug and prostitution offenses. [R2 264 ¶71 . Sweet also received immunity in Florida for the Maxcy case and for perjury committed in his two trials. [R2 264 ¶7]. After receiving immunity, it was Sweet's testimony that was central to Kelley's indictment and prosecution. Kelley v. State, 486 So. 2d at 580.

Kelley's initial trial in January 1984 resulted in a hung jury, from which the court declared a mistrial. [R2 271 ¶9]; Id. at 580. In the second trial, the jury was again impassed until the court gave a non-standard deadlock instruction, which highlighted that there was no other evidence that could be introduced in any future re-trial; according to the instruction, the jury had all the evidence that existed. Id. at 584. After receiving that instruction, the jury found Kelley guilty of first degree murder. In the penalty phase, the jury recommended 8-3 that he receive the death penalty. [Kelley II 985]; Kelley v. Singletary, 222 F. Supp. 2d 1357, 1360 (S.D. Fla. 2002). On April 2, 1984, Kelley was sentenced to death. [Kelley II 1007]; Kelley v. Singletary, 222 F. Supp. 2d at 1360.

As this Court recognized, this was a highly unusual case raising unusual issues. Kelley v. State, 486 So. 2d at 579. The prosecution of Kelley's case was based largely on Sweet's testimony. Kelley v. State, 486 So. 2d at 580; Kelley v. Singletary, 222 F. Supp. 2d at 1359.

The prosecution argued that, according to Sweet's story, the murder was carried out by two men who

drove to the Maxcy residence with Sweet, went into the house, and waited for Mr. Maxcy to arrive home from work. [Kelley II 435, 546, 862, 890] Significantly, the prosecution presented no other theory as to how the crime occurred or the number of persons involved. Id.

The lawyers representing Kelley during his trials chose not to present evidence in his defense and, instead, rested without presenting a case-in-chief. [Kelley II 813]. In deciding how to defend, they were hamstrung by a lack of physical evidence to present about the crime scene and related events. While mention was made of the bloody crime scene and the lack of blood evidence connecting Kelley to the crime scene, the defense was unable to develop this theme with physical evidence and a full crime scene reconstruction. [See Kelley II 825, 833].

In closing argument, Kelley's lawyers argued that Sweet was an admitted liar and was lying about Kelley's involvement in the crime. [Kelley II 818, 840, 844-847]. The defense argued that Sweet named Kelley as a participant in the crime because everyone else who was allegedly involved was dead or missing by 1981, and Sweet accordingly had no one else to offer up to the prosecution to secure his immunity from prosecution in Florida. [Kelley II 842]. But, since the existence of the physical evidence was not disclosed to Kelley by the prosecutors, the defense was unable to present physical evidence to bolster its argument that Sweet was lying and that Kelley was not at the murder scene.

After retiring to deliberate, the jury reached an impasse. After giving the standard deadlock

instruction, the trial judge gave the following additional and non-standard instructions:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

See Kelley v. State, 486 So. 2d at 584.

The State stayed silent when this jury charge was read. In fact, the State knew there was more evidence - from the crime scene itself - that had not been disclosed to Kelley or his counsel. That evidence was presumed to still exist, since the only destruction order did not encompass this other evidence.

E. Kelley's Direct Appeal

On direct appeal, Kelley contended, among other things, that giving the non-standard deadlock language -- after the jury had deliberated for several hours and announced that it had reached an impasse -- impermissibly misled and so coerced the jury into returning a verdict that it deprived Kelley of his right to a fair trial. See Kelley v. State, 486 So. 2d at 584. This Court, however, concluded that, "while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given." Id. at 85.

Kelley also contended on direct appeal that the State's destruction of evidence held by the Clerk of Court over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. See Kelley v. State, 486 So. 2d at 580. This Court described how, after Sweet's trial, the case file, including the evidence, had been transmitted to the clerk and then destroyed nine years later on the State's motion. This Court then stated:

> The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment.

Id. at 580.

That list of items in this Court's opinion refers to the evidence at Sweet's trial that was destroyed with specific authorization of the trial court. It does not make any reference to the other fruits of the prosecution's crime scene investigation. Although Kelley and the Court did not know it at the time, that other evidence had been returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to four officers of the submitting authorities. [Rl 56, 63-67]. The whereabouts of that evidence before the 1984 trial remains unknown to Kelley today, because the trial court below denied Kelley's Rule 3.851(e) (2) Motion, leading to this appeal. (See Section G, below). What is known is the destruction order did not reach that evidence and the State has come forward with no evidence suggesting it was destroyed as of 1984. Thus, as discussed at page thirty-two (32) below, that evidence is presumed under Florida law to have existed at the time of Kelley's trial.

F. Post-Conviction Proceedings

1. Kelley's Rule 3.850 Motion

On November 20, 1987, Kelley filed a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. After denying portions of the motion on May 27, 1988, the trial court held a hearing on July 18-19, 1988, and then denied the remainder of the motion. This Court affirmed. See Kelley v. State, 569 So. 2d 754 (Fla. 1990)

Among the issues addressed by this Court was whether the State's destruction of material evidence

prior to Kelley's trial deprived him of his constitutional rights. This Court ruled that its prior opinion on direct appeal resolved this issue, *sub silentio*:

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley.

Kelley v. State, 569 So. 2d at 756.

The Court also noted that "in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed." Id. We now know, however, that those affidavits were based on incomplete information, due to the failure of the State to disclose to Kelley that the fruits of the prosecution's investigation that were not used at Sweet's trial had been returned to the submitting authorities.

The record shows there never has been an evidentiary finding that such evidence was in fact destroyed prior to Kelley's trial. Nor would the record before this Court on direct appeal and in the post-conviction proceedings have supported a finding that all evidence had been destroyed. Presumably, it had not been destroyed, as no court order authorized such

destruction, and the State never has come forward with any state official who could attest that this evidence was in fact destroyed after being returned to the submitting authorities and before Kelley's trial. Obviously, information about the existence and whereabouts of this evidence was solely and peculiarly within the State's own knowledge.

In the 1990 appeal, Kelley also raised a Brady claim, but it was entirely different from the suppression of evidence at issue in the current appeal. The Brady claim in the 1990 appeal involved several specific items of evidence: (i) a transcript of the first Sweet murder trial; (ii) a latent fingerprint report; (iii) a 1967 police report showing that Kaye Carter could not positively identify Kelley; (iv) crime scene photographs; (v) the fact that Sweet received immunity in Massachusetts for his cooperation in the Maxcy case; and (vi) the agreement with Sweet that precluded Roma Trulock from testifying at Kelley's trial. Kelley v. State, 569 So. 2d at 757-58.

None of that evidence is part of the May 10, 2006 letter informing Kelley that much crime scene evidence still existed in 1966 and 1967 that was not disclosed to Kelley before trial. Its whereabouts at the time of Kelley's trial has never been explained by the State. All information about this additional evidence was kept from Kelley prior to his 1984 trial.

2. Kelley's State Habeas Petition

On April 8, 1991, Kelley filed a petition for habeas corpus relief in the Florida Supreme Court. Kelley's petition was denied on March 12, 1992. See Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992). None of the issues related to evidence, or destroyed evidence.

3. Kelley's Federal Habeas Petition

On October 9, 1992, Kelley petitioned the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus. Kelley v. Singletary, 222 F. Supp. 2d at 1361. Among the six claims raised by Kelley was a Brady claim that tracked the Brady claims raised in Kelley's Rule 3.850 motion in state court. As noted above, those Brady claims are different from the claim at issue in this motion.

On August 31, 2000, the District Court denied some of Kelley's claims on the basis of the record from Kelley's trial. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1331 (11th Cir. 2004). On November 22, 2000, the federal court held a series of evidentiary hearings. Id. Following these hearings, on September 19, 2002 the court granted Kelley federal habeas relief, reversing his conviction and ordering a new trial, based on a finding of significant Brady violations. Kelley v. Singletary, 222 F. Supp. 2d at 1366, 1367. On December 30, 2002, the court again granted Kelley federal habeas relief based on a separate finding of ineffective assistance of trial counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002).

In granting Kelley habeas relief based on newly discovered evidence, Judge Roettger stated that "[t]his case presents many incidences of prosecutorial misconduct. Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence." Kelley, 222 F. Supp. 2d at 1363. Judge Roettger further noted that "[i]n another capital murder case, Circuit Judge

Barbara Fleischer, sitting by designation by the Florida Supreme Court as a temporary judge of the Tenth Circuit, ordered a new trial for a defendant because Assistant State Attorney Hardy Pickard withheld impeachment materials from the defense. State of Florida v. Melendez, No: CF-84-1016A2-XX (Tenth Judicial Circuit of Florida), slip op., filed December 5, 2001." Id. at 1363 n.3. Melendez was a 2001 Order setting aside a 1984 conviction.

More specifically, Judge Roettger found that Pickard had withheld several items from Kelley. These included information regarding Sweet's immunity deal; the transcript of Sweet's first trial; a police report in which a witness gave an inaccurate description of Kelley and was unable to positively identify him; and a fingerprint report that found Kelley's fingerprints did not match any of those lifted from Maxcy's house and car. Id. at 1364-66. Judge Roettger deemed all of this evidence to be material and exculpatory.

The State appealed the habeas relief to the Eleventh Circuit Court of Appeals, which reversed on July 23, 2004 and reinstated the conviction. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1333, 1369. The Eleventh Circuit did not disagree that Pickard had wrongly withheld evidence. Instead, it held that Judge Roettger applied the wrong legal standard in granting an evidentiary hearing and that, in any event, the non-disclosed items could not have affected the outcome of the trial. Id. at 1333, 1340-43, 1369. Thus, Judge Roettger's findings of prosecutorial misconduct never were themselves specifically negated, only his findings that they could have affected the trial.

4. **Kelley's Motion For DNA Testing**

On January 17, 2006, Kelley petitioned, pursuant to Florida Rule of Criminal Procedure 3.853, for post-conviction DNA testing of physical evidence collected by law enforcement. That motion affirmatively requested, among other things, pre-hearing discovery to locate the DNA evidence that should be tested.

In his motion, Kelley acknowledged that, according to the State, certain physical evidence gathered from the crime scene had been destroyed pursuant to a court order nearly a decade before he was convicted. It was clear from the face of Kelley's motion that the evidence destroyed under the court order was not the subject of his request for postconviction DNA testing. [See Kelley DNA ROA1 13-18]. Although Kelley and his defense attorneys had been left by the State to incorrectly assume at trial and in post-conviction proceedings that all fruits of the prosecution's investigation had been destroyed, the factual record in his case contained no finding by the court that the other items of physical evidence collected from the crime scene, but not a part of the Sweet trial, had been destroyed at the time of Kelley's trial (or ever). This motion sought to determine if all such evidence had in fact been destroyed, even though that was not authorized by the only destruction Order.

In preparing for a hearing on this motion, Kelley received the correspondence dated May 10, 2006 from Assistant State Attorney Victoria Avalon that now disclosed that, in fact, over thirty pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to four

different officers of the submitting authorities. [R1 56, 63- 67]. The State had never previously disclosed the existence or whereabouts of the physical evidence.[2]

Kelley's Motion for DNA Testing was denied on June 29, 2006. Kelley appealed that ruling to this Court. On October 25, 2007, this Court affirmed the lower court's order. Kelley v. State, 974 So. 2d 1047 (Fla. 2007).

G. The Current Action: Kelley' s 3.851(e) (2) Motion

On May 9, 2007, pursuant to Florida Rule of Criminal Procedure 3.851(e) (2), Kelley requested the trial court to reverse his conviction and vacate his death sentence based on the State's violation of Brady v. Maryland, 373 U.S. 83 (1963) and Florida Rule of Criminal Procedure 3.220, which requires a duty of disclosure on the part of the State to provide material information in its possession to the defendant. [R1 1-180) . It is the summary denial of that Motion that led to this appeal. [See R3 403-10)

Kelley's Motion was based on an extraordinary turn of events in this case. The entire history of this case has proceeded on the defendant's and the courts' core assumption that all of the fruits of the prosecution's investigation of the 1966 crime scene were destroyed. The State's May 10, 2006 disclosures -- which attached receipts of public officials for the returned evidence -- destroyed that assumption. [See R1 56, 63-67].

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[2] Kelley's Brady v. Maryland, 373 U.S. 83 (1963), claim addressed in this appeal was triggered as of May 10, 2006, after Kelley's DNA motion had already been filed.

The May 10, 2006 letter was the first time in the history of this case that Kelley or his lawyers --- or any court -- learned that over thirty pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to R. Trulock, Robert E. McCory, Don Bragg, and Broward Coker, officers of the submitting authorities.[3] The order authorizing destruction of evidence related solely to evidence used at Sweet's trial and that was in the hands of the circuit court clerk. The May 10, 2006 letter relates to evidence in the hands of other individuals that was not used as evidence at Sweet's trial.

Because the return of the evidence to these individuals had never before been revealed by the State, Kelley was deprived of the opportunity prior to his trial to determine what those four persons did with the physical evidence that was returned to them. Instead, Kelley and his lawyers always have been allowed by the State to assume that all of the evidence from the 1966 investigation was destroyed, and to proceed before the courts based on that premise. That mistaken premise directly affected the way the trial was defended, the way a deadlocked jury was charged by the trial court with a non-standard deadlock charge, and the way the direct appeal and post-conviction proceedings were framed.

In his Motion, Kelley contended that the State's failure to disclose this evidence earlier is a violation

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[3] The supporting documentation attached to the May 10, 2006 letter reveals the initials of a fifth person who may have received some of the returned evidence. That person has not yet been identified by name.

of Brady - exactly the type of prosecutorial misconduct this Court said in Kelley v. State, 486 So. 2d at 582, likely would have caused a reversal of Kelley's conviction. [See R1 3-4]. It is fundamental error infecting the very core of the proceedings. The State had information about the disposition of physical evidence, but had suppressed that information despite a duty to disclose it. That decision to suppress left Kelley and his attorneys unable to look for, much less find, that physical evidence. Given the State's lack of disclosure, Kelley's attorneys proceeded to trial on the erroneous assumption that all of the crime scene evidence was destroyed. [See R1 1-4].

Kelley's Motion also asserted that the suppressed evidence underscored the error in the non-standard deadlock charge that was given to the jury when it reached an impasse. Instead of simply giving the standard charge, the trial judge added other admonitions to the jury, including this one: "There is no reason to believe there is any more evidence or clearer evidence could be produced on either side." See Kelley v. State, 486 So.2d at 584. We now know that significant other evidence is presumed to have existed that was not the subject of the court's destruction order.

The Motion asserted that the additional, non-standard deadlock charge was in fact false. See Giglio v. United States, 405 U.S. 150 (1972) (state's knowing presentation of or failure to correct false and material information at trial violates due process rights). [R1 at 21-22] . Had this jury not been improperly told that no more evidence ever could be produced, the Motion contended that Kelley's trial

could well have ended in an acquittal, or at least another impasse.

Kelley's Motion also noted that the State had an obligation to disclose the disposition of this evidence in 1966 and 1967 pursuant to the then-current version of Florida Rule of Criminal Procedure 3.220. [R1 at 24]. As the failure to disclose undermined any confidence in the verdict returned, the Motion asserted the State's violation of this rule was an independent basis for relief. It also infected the direct appeal and all post-conviction proceedings, and the completeness of the record developed in federal habeas proceedings. The State's suppression of evidence forced Kelley to assume incorrectly in his appellate and post-conviction proceedings that the evidence at issue had been destroyed.

The State filed its Response To Successive Motion For Postconviction Relief on May 29, 2007. [R2 181-226]. That Response focused almost entirely on Kelley's supposed lack of due diligence in bringing his Motion -- even though the State admitted that "the Florida Supreme Court no longer recognizes a 'due diligence' prong for substantive Brady claims" [R2 200] -- and on the substantive elements of Kelley's Brady claim.

The State relegated its entire response to Kelley's independent fundamental error claim regarding the State's duty to disclose under Florida Rule of Criminal Procedure 3.220 to footnote five on page twenty-four of its Response. [R2 204 n.5] The State asserted the violation of Florida Rule of Criminal Procedure 3.220 could not serve as a basis for relief because Kelley did not claim "surprise at trial" -- of

course, it would have been astonishing had he been able to express "surprise" about something he did not then know (i.e., that the prosecution had not fulfilled its discovery obligations) . [R2 204 N.5]

The State did not address Kelley's claim based upon Giglio v. United States, 405 U.S. 150 (1972), which was directed to the presumptively false and non-standard deadlock instruction that was given to the jury. The State did not address Kelley's claim of fundamental error. Nor did the State contend that it ever produced the Brady evidence at issue to Kelley before his trial.

In his September 18, 2007 Reply, Kelley pointed out that the State convicted him eighteen years after the crime occurred, on the basis of primary testimony from the immunized mastermind of the murder for hire (an admitted liar), and without ever accounting for what happened to all of the other crime scene evidence. Kelley pointed out that the State incontestably had withheld critical evidence, and, under the presumption of regularity of business practices, the evidence presumably existed at the time of Kelley's trial. [R2 253-82]. The State waited until 2006 to disclose this evidence to Kelley.

On December 20, 2007, the trial court entered an order denying Kelley's Motion for Postconviction Relief. [See R3 381-403]. This was a summary denial. Kelley had asked for an evidentiary hearing, but did not receive one.[4] This appeal followed. [R3 381]

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[4] That hearing would have involved, for example, an examination of evidence such as the handwritten list attached as Exhibit D to Kelley's Motion for Postconviction Relief that

Kelley has also filed contemporaneously with this appeal a Petition for Writ of Habeas Corpus. The Habeas Petition emphasizes that there has never been a factual determination that all fruits of the prosecution's crime scene investigation were destroyed prior to Kelley's trial in 1984. Yet, based upon a misapprehension of the record on appeal (left uncorrected by the State), this Court may have assumed that fact in deciding Kelley's direct appeal, see Kelley v. State, 486 So. 2d 578 (Fla. 1986), and said as much in Kelley v. State, 569 So. 2d 754 (Fla. 1990), which affirmed the denial of Kelley's first motion for postconviction relief. Although this appeal can correct this manifest injustice with the grant of a new trial or, at a minimum, an evidentiary hearing to determine what happened to the evidence, Kelley filed the Habeas Petition as a precautionary measure, in the case the Court concludes that relief on the specific ground raised there is dependent upon the factual record provided in the Appendix to that original proceeding.

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expressly lists Broward Coker, Robert McCoy, and Roma Trulock as potential witnesses. Undersigned counsel believes in good faith that this document came from the pre-trial files of the State Attorney's Office. Kelley believes it indicates actual knowledge, prior to Kelley's 1984 trial, by the State Attorney's Office, of the specific individuals to whom the evidence was returned in 1966 and 1967.

SUMMARY OF THE ARGUMENT

This Court has an awesome responsibility in any death penalty case, but it is especially awesome in this unusual case, where the conviction originally was upheld only with reservations and caveats that were prophetic. Kelley's first trial ended in a hung jury and mistrial. The second resulted in an impasse broken only by a non-standard and contested deadlock instruction. This Court declared it likely would have overturned the conviction if there had been even a "hint of prosecutorial misconduct."

Had it been known then that the State failed to disclose the crime scene evidence at issue in this appeal -- as is finally known now -- there can be no doubt the conviction would not have been upheld in the face of that "hint of prosecutorial misconduct." But, not only did the State not disclose that evidence to Kelley as it was obligated to do, it stood by and allowed this Court and other courts to proceed on the erroneous assumption that all of the crime scene evidence gathered by the State had been destroyed before Kelley's trial.

In fact, the State has never accounted for <u>that</u> evidence, and there never has been a factual determination that it was destroyed before the Kelley trial. That evidence accordingly is presumed under settled Florida law to have existed at the time of the Kelley trial. Had it been disclosed to Kelley, the trial would have been entirely different, the erroneous deadlock instruction never would have been given, and the outcome of the trial -- which already had reached an impasse -- almost certainly would have been different.

This Court was allowed by the State to proceed on an erroneous assumption. Now that the error has been disclosed, this Court should not hesitate to take the action it said it likely would have taken had there been a "hint of prosecutorial misconduct" in the case. It has taken years to uncover that prosecutorial misconduct, but that delay cannot alter the inexorable result of its discovery. That Judge Roettger correctly assessed Pickard's conduct in the Kelley prosecution has now been confirmed by the State's belated disclosure of other, incontestably material but suppressed evidence. That brings a new light to this Court's earlier recognition, on direct appeal in 1986, of the unusual facts of this case and its emphasis that "if even the slightest hint of prosecutorial misconduct was present in this case, the result might well have been different." Kelley, 486 So. 2d at 582. This conviction and death sentence must be overturned.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT KELLEY DID NOT ESTABLISH A BRADY v. MARYLAND CLAIM.

A. Standard of Review.

In reviewing the trial court's denial of the Brady claim made by Kelley, this Court gives deference to the trial court on questions of fact, but reviews de novo the application of the law and independently reviews the cumulative effect of the suppressed evidence. See Green v. State, 975 So. 2d 1090, 1101-02 (Fla. 2008), citing Mordenti v. State, 894 So. 2d 161, 168 (Fla. 2004); Way v. State, 760 So. 2d 903, 910 (Fla. 2000).

B. Kelley established that the State committed a Brady v. Maryland violation.

There are three components of a Brady violation: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In United States v. Bagley, 473 U.S. 667, 676 (1985), the United States Supreme Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes.

1. The evidence was favorable to Kelley.

The trial court erred in concluding Kelley's current claim is a mere "variation of his previous challenges to the destruction of evidence." [R3 407]. To the contrary, this is a discrete Brady claim that

only was asserted when Kelley learned -- for the first time -- that the State had information about the location and disposition of over thirty pieces of physical evidence sent to the Florida Sheriff's Bureau Crime Laboratory in Tallahassee, but had suppressed that information and had never disclosed the existence of that other evidence prior to his 1984 trial.

As the extensive record in this case shows, that decision to suppress left Kelley and his attorneys unable to look for, much less find, that physical evidence. The argument of Assistant State Attorney Hardy Pickard, in January 1984 and prior to Mr. Kelley's first trial, confirms that the amount of evidence destroyed pursuant to the 1976 Order was minimal. When William Kunstler, Kelley's trial counsel, indicated confusion about the evidence, Pickard expressly limited the scope of the evidence that was destroyed pursuant to the 1976 Order:

> What actually happened is the only evidence that was destroyed was the State's exhibits that were introduced into evidence [at Mr. Sweet's trial]. There were some defense exhibits introduced into evidence in Mr. Sweet's trial which were not destroyed and are still in the Clerk's Office. There is a list of all the State's exhibits that were destroyed. I have a copy of it because I got it from the Clerk. It's in Mr. Sweet's file, it would not be in Mr. Kelley's file, the one that does exist.
>
> . . . .

> We do know what the evidence is. There is a complete list of the evidence in the Sweet file. The transcript of Mr. Sweet's trial reflects specifically what the items of evidence are. What we're talking about is ninety percent of it is documentary evidence; copies of checks, copies of rental car agreements, copies of motel registrations. There is very little actual physical evidence.

[R2 312-13; 333-34]. The pre-trial transcript shows that Judge E. Randolph Bentley understood the destroyed evidence was limited to that introduced in the Sweet trial. [R2 322; see generally R2 311-70].

There was no mention at that pre-trial hearing case that other physical evidence, not introduced at the Sweet trial, was also destroyed: The State never disclosed that other physical evidence had been returned to four public officers. Kunstler was candid that he did not know what evidence existed. The transcript shows that Judge Bentley did not make a finding that the other physical evidence from the crime scene investigation, not introduced at the Sweet trial, was destroyed.

Given the State's lack of disclosure, which it was obligated to make, Kelley's attorneys proceeded to trial on the false assumption that all evidence had been destroyed. The State left a defendant who consistently has maintained his actual innocence without critical information relating to the location and disposition of the physical evidence collected by the State from the crime scene and related locations. This newly disclosed prosecutorial misconduct denied

Kelley due process and provides the precise "hint" that this Court said would undermine the conviction.

There can be no doubt the evidence could have been both exculpatory of Kelley and impeaching of Sweet. With that crime scene evidence, Kelley's defense team would have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including the bloodied carpets and hallways runners and (ii) the absence of blood evidence connecting Kelley to the crime.

Sweet claimed the killers left the crime scene in the victim's car. [Kelley II 593-94]. Therefore, all evidence taken from the car, scrapings from the outside left car door, brake pedal, floor mat, car keys, metal door sill, left door window channel, tire and steering wheel should have yielded fingerprints, footprints, blood specimens or other specimens.

Deputy Murdock testified, however, that no blood whatever was found in Maxcy's car, [Kelley II 496-97], despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [Kelley II 496]. In the light of Deputy Murdock's testimony, the suppressed evidence would have been exculpatory of Kelley and it would have provided a tangible, palpable way to impeach Sweet about his self-serving version of events, well beyond mere argument of counsel.

Simply put, physical evidence would have better allowed the jury to determine whether the arguments of counsel truly matched up with the crime scene evidence. The suppressed evidence would have been critically important in showing that Sweet was lying about how the crime unfolded. Even more

significantly, it would have allowed the jury to find there was "reasonable doubt" whether Kelley was involved in the crime. And, the incorrect deadlock charge would not have been given to the jury.

2. The evidence was suppressed by the State.

Kelley and his attorneys did not learn of the disposition of the evidence submitted to the Florida Sheriff's Bureau Crime Laboratory (now FDLE) until they received the May 10, 2006 letter disclosing this information for the first time. The State had the duty to disclose this evidence earlier, but did not do so. Even though Kelley specifically sought pre-trial exculpatory discovery from the State (but never received the specific documents at the center of this appeal or any information about the evidence to which they relate), see Kelley v. Singletary, 222 F. Supp. 2d at 1363, the State's duty to disclose would exist even if the defense had not made a specific request for the information. See Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); see also United States v. Bagley, 473 U.S. 667, 680-81 (1985).

As a constitutional imperative, the State cannot play hide-and-seek with such critical exculpatory and impeaching evidence. See Banks v. Dretke, 540 U.S. 668, 675-76 (2004) ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process"); Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001) (ruling the argument that the defendant is required to figure out

the existence of exculpatory evidence "is flawed in light of Strickler and Kyles, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory.").

The presumption of regularity of business practices attaches in this case. See Robinson v. State, 325 So. 2d 427, 429 (Fla. 1st DCA 1976) ("where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and the courts presume that they have properly discharged their official duties"). Hence, it must be presumed that the evidence was in fact received by the officers of the submitting authorities when it was returned to them by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967. The May 10, 2006 letter in fact attached receipts.

There was no court order in place then (or ever) allowing for the destruction of the evidence returned to officials by the sheriff. Absent proof to the contrary, then, and there is none, the presumption must be conclusive that the evidence still existed in the hands of the submitting authorities at the time of Kelley's trial. Even though the State asserts it has now been destroyed, there still is no evidence that it was destroyed at the time of Kelley's trial.

Instead, the State simply points to affidavits submitted by Kelley's trial counsel in support of his motion for postconviction relief stating that the fruits of the police investigation had been destroyed. The statements were erroneously made. Indeed, there is no way Kelley's trial attorneys could have known that all evidence was destroyed -- only the State

would have knowledge of that. Moreover, there has never been an evidentiary finding that such is the case, and the State has never put forth any proof of such destruction, other than by pointing to these statements by Kelley's own attorneys in reliance on the State's non-disclosures.

In sum, it was the duty of the State to disclose to Kelley the fact that the four public officers received and presumptively maintained the evidence. See Rose v. State, 787 So. 2d 786, 796 (Fla. 2001) (ruling that even where prosecutor does not know of the exculpatory material, suppression may still occur if State's agents possess exculpatory or impeaching evidence). Only then could Kelley have taken advantage of it.

The State did not make that disclosure until decades later, on May 10, 2006.

3. Kelley was prejudiced by the State's suppression of evidence.

The test for measuring the effect of the failure to disclose exculpatory or impeaching evidence is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. "Reasonable probability" is defined by this Court as "probability sufficient to undermine confidence in the outcome." White v. State, 664 So. 2d 242, 244 (Fla. 1995).

As this court explained in State v. Huggins, 788 So. 2d 238, 243 (Fla. 2001) (citing Strickler, 527 U.S. at 289-90 ("in reviewing the materiality of an alleged Brady violation and whether the third prong of

prejudice exists, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"))

There are numerous reasons why the verdict in this case is not "worthy of confidence." First, this Court itself declared that even a "hint" of prosecutorial misconduct would have changed the confidence it placed in the verdict. Although affirming the conviction, the Court took pains to say: "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582.

Now, we know there is a "hint" -- even more than a "hint" -- of misconduct by a prosecutor caught in the same type of misconduct on prior occasions. Indeed, in granting federal habeas relief, Judge Roettger reviewed this record and concluded that "[t]his case presents many incidences of prosecutorial misconduct." Kelley v. Singletary, 222 F. Supp. 2d at 1363. The May 10, 2006 letter discloses yet another instance of prosecutorial misconduct -- in this case, one that hardly could be dismissed as immaterial to the outcome.

Second, the suppressed evidence underscores the error in the non-standard deadlock charge that was given to the jury when it reached an impasse. Instead of simply giving the standard charge, the trial judge added other admonitions to the jury, including this key directive: "There is no reason to believe there is

any more evidence or clearer evidence could be produced on either side."

We now know that significant other evidence indeed is presumed to have existed. Accordingly, not only was the additional, non-standard deadlock charge coercive in the first instance, it was in fact incorrect, and the State stood by and allowed the jury to be misled. Even apart from its duty to disclose this evidence to Kelley, the State had a duty of candor to the Court not to let the court give a jury charge the State knew was factually incorrect. Had this jury not been improperly told that no more evidence could be produced, Kelley's trial might well have ended in an acquittal or at least another impasse.

Third, as explained above, the defense was precluded from letting the jury see the bloody evidence taken from the crime scene and see the lack of blood on the evidence taken from the car. A reconstruction for the jury using actual evidence is worlds apart from being limited to counsel's argument based on the State's selective evidence. In a case where Kelley consistently has maintained his innocence and Sweet's account of the supposed murder was front and center at trial, the crime scene and related evidence could have persuaded the jury that Sweet was lying about Kelley, in order to save his own skin.

Finally, the suppression of the evidence about the disposition of this evidence precluded the defense from developing and presenting even more exculpatory evidence at trial. The May 10, 2006 disclosures establish that Exhibits three (3) through nine (9) were returned to Broward Coker. Those

exhibits included body hair samples and fingernail scrapings from Mr. Maxcy and wall scrapings from Mr. Maxcy's bedroom.

The State presented testimony that a violent struggle preceded Mr. Maxcy's death. [Kelley II 494]. Consequently, it is likely Maxcy's body hair samples might have been mixed with the hair of the victim's assailants, providing further identification of suspects while also indicating that Kelley was not present at the scene. The same is true of Mr. Maxcy's fingernail scrapings and the scrapings from the wall of Mr. Maxcy's bedroom.

The State's May 10, 2006 letter also discloses for the first time that the hallway carpet runners and the bedroom floor carpet section were returned to Mr. Coker. They could have yielded footprints or other evidence exculpatory as to Kelley, while identifying other suspects.

The suppression of evidence by the prosecution constitutes fundamental misconduct of the worst sort, directly affecting the trial and the subsequent appeal. Kelley and his attorneys were forced to assume that all of the evidence was destroyed by the time of trial, and they had to frame their arguments accordingly on direct appeal and in post-conviction proceedings. Had the State properly disclosed the disposition of the evidence at issue, Kelley would have either found the evidence and used it at trial, or Kelley could have presented appellate and post-conviction arguments as to the evidence in an accurate way.

As it was, this Court was allowed by the State to proceed under the false belief that all of the evidence

gathered by the State was destroyed under a court order that in fact only authorized limited destruction of evidence held by the clerk of the court from Sweet's trial. That requires this Court to step in and correct this injustice.

The ultimate test is not whether a different verdict would have been reached had the evidence (or evidence disposition forms) been disclosed timely, but whether suppression "undermine[s] confidence in the outcome." White, 664 So.2d at 244. That is, the test is whether the verdict is "worthy of confidence." Huggins, 788 So. 2d at 243. See Way, 760 So. 2d at 912; Young v. State, 739 So. 2d 553, 559 (Fla. 1999).

Here, there is certainly a reasonable question whether Kelley's trial might have reached a different outcome if the evidence had been available for trial preparation or at trial or even if only the forms themselves had been available at trial. Such reasons are undoubtedly why this Court announced on direct appeal that "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582. There was the issue of Sweet's credibility, the hung jury at the first trial, the impasse at the second trial that was broken only by a non-standard instruction, and the concerns of prosecutorial misconduct expressed by Judge Roettger and now confirmed by the State's belated disclosure of suppressed evidence.

Any confidence in the verdict has been significantly undermined, and Kelley has been deprived of due process. Kelley has established a

Brady claim, and the trial court erred in summarily ruling otherwise.

II. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON KELLEY' S BRADY v. MARYLAND CLAIM.

A. Standard of Review.

A court's decision whether to grant an evidentiary hearing is subject to de novo review. Owen v. State, 2008 WL 1969141 at 2 (Fla. May 8, 2008) (citing State v. Coney, 845 So. 2d 120, 137 (Fla. 2003)).

B. Kelley should have been permitted an evidentiary hearing.

The trial court erred in denying Kelley an evidentiary hearing on his claim that the State withheld evidence in violation of Brady. The trial court should not have made "findings of fact" in its Order Denying Motion for Postconviction Relief, when Kelley was deprived of an evidentiary hearing on any factual issues contested by the State. [R3 403-10]

"Generally, a defendant is entitled to an evidentiary hearing unless the postconviction motion or any particular claim in the motion is legally insufficient or the allegations in the motion are conclusively refuted by the record." Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006) (citing Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)). "Additionally, where no evidentiary hearing has been held, an appellate court must accept the defendant's factual allegations as true to the extent that such allegations are not refuted by the record." Nixon, 932

So. 2d at 1018 (citing Peede v. State, 748 So. 2d 253, 257 (Fla. 1999)).

Because the factual basis for this Brady claim is unknown suppression of evidence, Kelley has not been able to raise a claim for prosecutorial misconduct until that disclosure finally was made to him by the May 10, 2006 letter from the State. Kelley is entitled to an evidentiary hearing on his Brady claim for this reason alone. The trial court erred in refusing him that process.

Furthermore, if Kelley had been provided an evidentiary hearing, he would have called certified crime scene reconstructionist Ross Gardner as a witness. Gardner would have testified that Kelley's defense team could have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including the bloodied carpets and hallway runners, and (ii) the absence of blood evidence connecting Kelley to the crime. As Gardner stated in his affidavit, a picture is worth a thousand words. [R1 34]. The physical evidence would have better allowed the jury to determine whether the arguments of counsel truly matched up with the crime scene evidence.

At an evidentiary hearing, Kelley also would have established that he had no prior knowledge of the disposition of evidence form. His former counsel during his federal habeas proceedings, James C. Lohman, would have testified he is certain he never saw the disposition-of-evidence records at issue in this appeal. [R1 49]. Likewise, paralegal Samantha Leone would have testified that in organizing and maintaining this voluminous case file on behalf of

Kelley's undersigned counsel, she is certain she has never seen the disposition-of-evidence records prior to receiving and reviewing the May 10th letter from Victoria Avalon. [R1 51-52].

Kelley also could have called officials of the FDLE to confirm the chain of custody of the physical evidence at issue, and to describe any efforts made to determine if it existed in 1984. Kelley also could have called former Assistant State Attorney Hardy Pickard to testify as to the evidence destroyed pursuant to the 1976 Order.

More specifically, in his September 18, 2007 Reply to the State's opposition to his Motion for Postconviction Relief, Kelley twice emphasized that there had never been a factual determination by a trial court that all of the fruits of the prosecution's investigation of the crime scene were destroyed prior to Kelley's trial. To be sure, as the trial court noted in footnote 2 of its Order, it had made a determination in 2006 that, as of that time, "no evidence remained in existence." [R3 404]. The court, however, ignored the critical distinction that no trial court ever determined that all evidence had been destroyed prior to Kelley's trial in 1984.

In fact, the 1976 Order authorizing the destruction of evidence from Sweet's trial makes it clear that only evidence from that trial was addressed there. In that order, the Highlands County Circuit Court authorized and directed the Clerk to "dispose of evidence in the above styled cause [State of Florida v. Sweet, Case No. 3002]." [R2 305]. There simply is no hint that the evidence returned to the submitting authorities were introduced as evidence

in the Sweet trial. Not even the State has suggested, nor could it, that the returned evidence was destroyed pursuant to the 1976 Order, which did not authorize any such destruction because the returned evidence was not in the possession of the Clerk. The State simply says, without explanation, that this evidence has been destroyed.

But, the fact remains, those items indisputably were not used as evidence in the Sweet trial, and hence the 1976 Order, on its face, did not authorize their destruction. Presumably the State only destroyed evidence it was authorized to destroy.

There was no mention in 1984 prior to Kelley's trial that other physical evidence, not introduced at the Sweet trial, was also destroyed. Thus, Judge Bentley could not have made a finding that the other physical evidence covered by the withheld evidence disposition forms was destroyed.

Nor could this Court have made such an evidentiary finding in the first instance. Yet, that awful result inadvertently occurred based on the honest mistake of Kelley's counsel that the State allowed to stand uncorrected: this Court appears to have assumed that all evidence was destroyed pursuant to the 1976 Order. That was simply an assumption and was not supported by any competent evidence, much less any finding by the trial court.

And, that erroneous assumption has been repeated over the years. It has become a self-perpetuating error and the State let it stand, despite knowing otherwise until finally admitting its existence in May 2006. In its Order, the trial court pointed to Florida Supreme Court opinions to justify

its conclusion that a finding has been made that the evidence at issue was destroyed prior to 1984. [R3 406-07]. But that evidentiary finding has never been made by a trial court, and this Court's assumptions are now shown by the State's belated disclosure to have been unwarranted.

CONCLUSION

To sum up: Kelley argued to the trial court that the presumption of regularity attaches and it should now be presumed that the fruits of the prosecution's investigation of the crime scene existed at the time of his trial. Based upon a violation of Brady, his conviction should be reversed and his sentence vacated.

The trial court thus erred in not finding that Kelley established a prima facie Brady claim. At the very least, the trial court should have conducted an evidentiary hearing to determine the factual circumstances surrounding the destruction of all the evidence. It erred in not doing so.

The trial court's order should be reversed.

Dated: June 9, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant William H. Kelley has been furnished by Federal Express to the following persons on this 9th day of June 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this Petition is 12-point Courier New, and that this Petition fully complies with the requirements of Florida Rules of Appellate Procedure 9.142 and 9.210.

_____
Sylvia H. Walbolt

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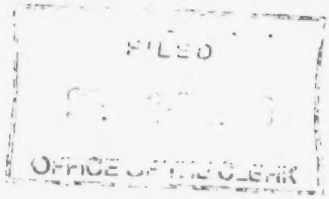
No. 09-53



IN THE

Supreme Court of the United States

WILLIAM HAROLD KELLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Supreme Court

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

If this Court denies certiorari, the State of Florida will execute petitioner Billy Kelley. There is every reason to fear that he will go to his death an innocent man, framed by the testimony of the admitted mastermind of the killing given in exchange for amnesty, and mistakenly convicted as a result of the State's undisputed suppression of the evidence at issue in the petition.

The circumstances of this case give rise to a substantial claim under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which Kelley immediately pursued. But the Florida Supreme Court excused the State's serious misconduct on the ground that "the evidence disposition forms at issue are neither favorable nor material" because they contained no direct evidence of Kelley's innocence. Pet. App. 17a-18a. As the petition explained, that narrowly circumscribed interpretation of the *Brady* materiality inquiry is insupportable. The State's attempts to recharacterize the ruling below are unpersuasive. Its suggestion that Kelley's *Brady* claim would fail for other reasons is irrelevant at this stage of the proceeding (because they were not the basis of the ruling below), substantively wrong, and rests on a significant misstatement of fact that the State has withdrawn subsequent to filing its opposition.

The petition for certiorari should be granted, the Florida Supreme Court's *Brady* ruling reversed, and the case remanded for further proceedings.

1. The petition demonstrated that the Florida Supreme Court improperly narrowed the *Brady* materiality inquiry and considered only whether the forms directly proved Kelley's innocence. The State does not dispute that it suppressed the evidence disposition forms. It furthermore agrees that under this Court's precedents the determination whether it was required to disclose the forms includes an assessment whether they would have led Kelley's counsel to secure other material evidence. *See* BIO 15, 17; Pet. 18-21. It is thus common

ground that, if petitioner's reading of the ruling below is correct, the Florida Supreme Court's decision squarely conflicts with this Court's precedents and decisions of several circuits. Certiorari would plainly be warranted.

The State's answer is that "the Florida Supreme Court did exactly what Kelley claims it should have done." BIO 16. That is not correct. The petition set forth the court's analysis of his *Brady* claim (at 14-15), and we reproduce it in its entirety once again here:

> Here, an evidentiary hearing on Kelley's *Brady* claim was not warranted because the record conclusively demonstrates that Kelley is not entitled to relief. Specifically, the record demonstrates that the evidence disposition forms at issue are neither favorable nor material. *These forms memorialize the transfer of evidence from the Florida Sheriff's Bureau to local officials after laboratory testing. They do not exculpate or exonerate Kelley; the forms do not mention Kelley or implicate someone else. Likewise, they do not offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses.* Furthermore, there is not a reasonable probability that, had the evidence disposition forms been disclosed, the result of the proceedings would have been different. Our confidence in the outcome is not undermined. Accordingly, because the evidence disposition forms are not favorable to Kelley and because the State's failure to disclose them did not prejudice Kelley, no *Brady* violation occurred.

Pet. App. 17a-18a (emphasis added).

This language could not be clearer. The Florida Supreme Court strictly limited its assessment to the effect that the forms themselves would have had on the jury. The court's analysis leaves no room for considering the crime

scene evidence itself, which was reflected on the forms and which Kelley's counsel certainly would have pursued if they had known that it was not included within the materials authorized to be destroyed by the court order.

The State almost entirely ignores the Florida Supreme Court's discussion of petitioner's *Brady* claim. The only discussion approaching a response is the State's passing mention in a single sentence of the fact that the "court specifically observed that its confidence in the outcome had not been undermined, and that there was no reasonable probability of a different result, had the forms been disclosed prior to trial." BIO 16-17. But those statements cannot be ripped from their context. The full paragraph explains *why* the Florida Supreme Court retained its confidence in the outcome of the trial: it believed that the forms themselves would not have changed the outcome, which was the only inquiry it deemed to be relevant and undertook.

If the court had instead deemed relevant the effect of the evidence contained in the forms, it surely would have mentioned that evidence. It strains credulity to believe that the court detailed why the forms were not material by their terms, then implicitly – and without any discussion – rejected the far more substantial claim that Kelley's counsel would have located the non-Sweet crime scene evidence and put it before the jury.

The State's principal argument is instead that other language in the opinion below demonstrates that the court undertook a broader materiality inquiry. But the entirety of the court's analysis is set forth in the preceding block quote. The short excerpt quoted by the State in its opposition (at 16) relates to a *different* claim by Kelley relating to *different* evidence. As described at length in the petition (at 8-10), Kelley previously litigated and lost in the state courts the claim that the prosecution violated his right to due process when it destroyed the evidence relating to the case. That claim related to both the Sweet trial evidence (which was

destroyed) and the non-Sweet crime scene evidence (which petitioner was told *after* those claims were litigated had instead *actually* been returned to the investigating authorities).

In the opinion now under review, the Florida Supreme Court returned to that destruction of evidence claim in the language that the State excerpts (which we reproduce in full, setting out in double brackets the limited language quoted by the State):

> To the extent Kelley is seeking to use the evidence disposition forms to relitigate his prior claims regarding the destroyed evidence, he is procedurally barred from doing so. As this Court determined on direct appeal and in the appeal of the first postconviction motion, the destruction of evidence did not prejudice Kelley's case. *Kelley*, 486 So. 2d at 582; *Kelley*, 569 So. 2d at 756. Moreover, when affirming the denial of Kelley's postconviction DNA testing motion, this Court explained that the "*evidence collected in the Sweet trials was destroyed by court order in 1976* . . . . As testified to by the nine witnesses, none of the requested items were located despite a diligent search." *Kelley*, 974 So. 2d at 1051. Thus, [[we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover *evidence that was destroyed by court order in 1976* and could not be located despite a diligent search.]]

Pet. App. 18a (emphasis added) (capitalization omitted) (double brackets reflect language quoted at BIO 16).

The State contends that the language it has quoted rejects Kelley's *Brady* claim on the ground that the evidence cited in the forms was "destroyed by court order in 1976." It asserts that "[c]learly, as the opinion expressly indicates, the Florida

court did not limit its analysis to the value of the forms themselves, but considered the effect that disclosure of the forms might have had on preparation of the defense." BIO 16.

But that is doubly wrong. First, the language quoted by the State is wholly unrelated to petitioner's *Brady* claim. Instead, having concluded the analysis under *Brady*, which was strictly limited to the forms, the court explained that the evidence disposition claims do not alter its prior rejection of Kelley's claim that the State had violated due process by "destroy[ing] evidence." Second, as is plain from the language that the State omits from its quotation, the destroyed evidence in question was only the "evidence collected in the Sweet trials," which "was destroyed by court order in 1976," rather than the distinct and far more extensive non-Sweet crime scene evidence.

Given the foregoing, the Florida Supreme Court's decision conflicts with bedrock principles under *Brady v. Maryland* as articulated by this Court and other circuits. Whatever the value of the forms if put directly before the jury, the State's failure to disclose them caused the defense to "abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *United States v. Bagley*, 473 U.S. 667, 682 (1985). *See* Pet. 19-22 (collecting Supreme Court and federal appellate precedents). The judgment accordingly should be vacated and the case remanded for the Florida Supreme Court to conduct a proper analysis under *Brady*.[1]

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[1] As the petition explained, granting review in this case would also have the collateral benefit of almost surely resolving the well-recognized conflict over whether evidence may be material if it would not itself be admissible at trial. If petitioner is correct that evidence is subject to *Brady* if it will lead the defense to other material avenues of inquiry, then the

2. The remaining arguments in the opposition present no basis for denying review.

Petitioner recognizes that the state trial court stated that the non-Sweet trial evidence was destroyed prior to Kelley's trial (Pet. App. 8a), although it manifestly was not a "finding" (*contra* BIO 20). When petitioner's counsel reiterated to the trial court that there was no evidence of that fact in a petition for rehearing, the trial court did not disagree. Instead, it concluded that "the status of th[is] physical evidence in 1984 [when Kelley was tried] has no bearing on the claim." Pet. App. 12a.

The State nonetheless asserts that an "extensive record" supports that conclusion. BIO 20. This Court need not be drawn into that factual dispute, however. The Florida Supreme Court did not rest its decision on that basis. On remand, it is free to consider that question. The Florida Supreme Court's decision instead rested on its narrow conception of the *Brady* materiality inquiry, which this Court should grant certiorari to review.

On remand from this Court, the Florida Supreme Court will surely refuse to dismiss Kelley's *Brady* claim on the basis of the State's assertion that the record shows that the non-Sweet crime scene evidence was destroyed prior to his trial. There has never been a proceeding in which proof on that issue could be developed or presented. The trial court did not dispute that "there has never been an evidentiary finding that [these] items of physical evidence were actually destroyed prior to trial." Pet. App. 2a-3a. It nonetheless summarily dismissed petitioner's *Brady* claim. The Florida Supreme Court, in turn, concluded that "an evidentiary hearing on Kelley's *Brady* claim was not warranted," because

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admissibility *vel non* of that evidence is logically irrelevant. *See* Pet. 22-25.

the claim failed as a matter of law under its narrow materiality standard Pet. App. 17a.[2]

Nor could Kelley otherwise be fairly required to prove, in the absence of an evidentiary hearing, that the non-Sweet crime scene evidence still existed at the time of his trial. The State concededly told Kelley's lawyers prior to trial that it had no *Brady* material to disclose, but then brazenly suppressed the disposition forms. The evidence to which the forms referred was in the *State's* possession. A defendant in Kelley's position has no way to prove what the State did with the evidence without authority from a court to pursue the claim. But as noted, petitioner was never permitted to either develop or present the basis for his claim that the evidence remained available at the time of his trial, and was only later destroyed by the State.

There furthermore is no reason to infer that the non-Sweet crime scene evidence was destroyed pursuant to the 1976 destruction order. That order was not only expressly limited to the crime scene evidence admitted at trial, but also applied solely to evidence within the court's own files. As the opposition admits (at 6): "the State of Florida petitioned the court and obtained permission to destroy the physical evidence which had been admitted during Sweet's trials." The non-Sweet crime scene evidence, by contrast, was neither admitted at trial nor ever within the court's control, as it had been returned to the investigating authorities. That evidence could be destroyed only through a court's authorization. The presumption under state law is therefore that the evidence was retained. *Robinson v. State*, 325 So. 2d 427, 429 (Fla. 1st DCA 1976).

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[2] The State's assertion that Kelley "has no evidence [to the] contrary" (BIO 20) is thus simply disingenuous. Kelley has been denied any opportunity to develop or present that evidence.

Other rulings by the state courts also refute the State's contention that the non-Sweet crime scene evidence was destroyed prior to Kelley's trial. The State post-conviction court rejected petitioner's request that he be provided with DNA testing of this evidence. It reasoned that the evidence could not be located in 2006. *See Kelley v. State*, 974 So. 2d 1047, 1051 (Fla. 2007). The Florida Supreme Court reiterated that finding in its most recent opinion below. *See* Pet. App. 18a (discussing evidence that "could not be located despite a diligent search"). If the Florida courts actually believed that the non-Sweet crime scene evidence had been destroyed pursuant to the Sweet trial court's order, they would have had no reason to require a search for the evidence thirty years later and describe it as not locatable.

The State notably provides no record citation for its bald claim that there is an evidentiary basis for concluding that the non-Sweet crime scene evidence was destroyed prior to Kelley's trial. This Court can be certain that, if the State had any factual support for that critical assertion, it would have provided that support. But to resolve any doubt, we have appended to this brief the excerpts from the State's trial court and state supreme court briefs on this question. In those briefs, the State cited *only* the fact that "Kelley's trial attorneys provided sworn testimony at the postconviction evidentiary hearing that the crime scene evidence has been destroyed prior to trial." App., *infra*. But that assertion ignores the fact that, at the time Kelley's lawyers made that representation, they (i) had been *told that by the State*, and (ii) believed those representations *because they had not been provided the forms*. Kelley's attorney subsequently submitted a sworn affidavit in the Florida courts (also reproduced in the appendix), which the State ignores, saying precisely this. App., *infra*.

Ultimately, as noted at the outset, this factual question is not before this Court, because it (understandably) was not the basis for the Florida Supreme Court's decision, which instead

rejected petitioner's *Brady* claim as a matter of law. On remand, the State is free to press its flawed claim that the non-Sweet crime scene evidence was in fact destroyed prior to Kelley's trial.

3. The State's only remaining argument is that, even if Kelley had secured the evidence identified in the disposition forms, "no different outcome is possible, let alone probable." BIO 20. Again, the Florida Supreme Court did not decide the case on this basis. Nor is it a substantial claim, as illustrated by the fact that in two separate rounds of litigation the State did not even *dispute* that the evidence was material. *See* Pet. 6, 7. In fact, there is every reason to believe that the evidence would have made a significant difference. The only substantial evidence against Kelley came from Sweet, the acknowledged mastermind of the crime who testified in exchange for immunity. Though the State notes that "evidence was presented to corroborate Sweet's testimony as to Maxcy's murder, including bank records, phone records, car rental and hotel records" (BIO 6), that evidence showed *Sweet*'s guilt. The evidence against *Kelley* came from Sweet's wholly self-interested mouth. As the Florida Supreme Court explained: "It was this testimony upon which [Kelley's] indictment and prosecution in this case were centrally based." *Kelley v. State*, 486 So. 2d 578, 580 (Fla. 1986). The jury was duly doubtful and hung not just once (producing a mistrial), but twice. The second deadlock was broken only by an improper instruction that no further evidence existed.

The State asserts that "the jury was well aware" of the arguments that Kelley would have made on the basis of the non-Sweet crime scene evidence. BIO 20. But there is a dramatic difference between the effect of the arguments of counsel and the physical evidence of the crime, particularly in a capital case as close as this one. At the very least, the evidence would have shown a violent and bloody murder, but absolutely no blood in the car that Kelley supposedly drove

away immediately thereafter. The tangible hair and fingernail scrapings, with no match to Kelley, would have brought home to the jury that there was no physical evidence of Kelley's guilt, and that the State's case rested entirely on the claims of the true killer, who was seeking only to save himself.

Finally, respondent's Statement of the Case (at 1-2) suggests that Kelley's trial counsel should have known from the Sweet trial transcript that the non-Sweet crime scene evidence had been returned to the investigating authorities. That is demonstrably false. In response to an inquiry from Kelley's counsel, the State has now confirmed that "the testimony in the Sweet transcript relates specifically to the exhibits that were admitted at that trial" and that it "did not intend to suggest that that the Sweet trial transcript contained testimony specifically regarding the non-Sweet exhibits." Ltr. from Carol Dittmar to Joseph Lang (Sept. 29, 2009).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 29, 2009

APPENDIX

APPENDIX

STATE OF MASSACHUSETTS,

COUNTY OF SUFFOLK.

IN RE: WILLIAM H. KELLEY

AFFIDAVIT OF BARRY P. WILSON

1. My name is Barry P. Wilson. I am an attorney presently residing in Massachusetts. I am over 21 years of age.

2. I was counsel of record for William Kelley in his 1987 Florida Rule of Criminal Procedure 3.850 Motion for Post-Conviction Relief and in his appeal of the denial of same to the Florida Supreme Court. I represented Mr. Kelley up until the time of the filing of his federal habeas petition in 1992.

3. During my representation of Mr. Kelley, I became familiar with an issue relating to the destruction of certain evidence by court order. In that regard, I prepared affidavits for two attorneys who previously represented Mr. Kelley, William Kunstler and Jack Edmund. In each affidavit I wrote: "At some point during Mr. Kelley's trial it became clear that evidence had been destroyed, as well as the fruits of the police investigation."

4. In the reply brief I prepared in the appeal of the denial of Mr. Kelley's Rule 3.850 Motion for Post-Conviction Relief, I wrote: "It appears that at some point in Mr. Kelley's trial counsel became aware that the fruits of the police investigation had been destroyed."

5. I understand that my statements were subsequently interpreted to mean that every bit of evidence in the case had been destroyed. Kunstler, Edmund, and I would not have personal knowledge that all the evidence was destroyed. We knew only what we were told (or not told) by

the prosecution. Although prepared in good faith and to the best of my knowledge at the time, the affidavits and reply brief were mistaken to the extent they indicated personal knowledge that all fruits of the crime scene investigation were destroyed prior to Mr. Kelley's 1984 trial.

6. There were only six pieces of physical evidence introduced at the trial of John Sweet, (1) one bullet; (2) one tire; (3) one bed sheet; (4) a small section of the victim's shirt; and (5, 6) two handwritten notes by John Sweet. That is the only physical evidence the prosecution disclosed to the defense. The other approximately 40 pieces of physical evidence from the crime scene were never disclosed to the defense, nor was the trial judge notified of any evidence other than the six pieces destroyed by Court Order from the Sweet trial. At no time during Mr. Kelley's two trials did the prosecution ever disclose any information concerning the other pieces of evidence.

7. Throughout the briefs prepared on Mr. Kelley's appeals and various motions, I have argued the following, "Other evidence that was presumed destroyed and cannot be accounted for"; "No one discussed missing evidence"; "The destroyed, misplaced and unaccounted for evidence"; "Neither the trial court nor the Florida Supreme Court were fully apprised of the extent and nature of the evidence destroyed or lost, or simply never provided to the defense"; "The State never apprised the defense of missing crime scene evidence and there exists additional relevant evidence not accounted for by the order of destruction entered by the Sweet trial judge. This evidence is comprised of the fruits of the FDLE investigation of the actual crime scene." I made these arguments because I did not know what happened to any of the other pieces of missing evidence.

8. I apologize if the affidavits I drafted for Kunstler and Edmund, and my representations in the reply brief I prepared, misled the court to understand that all the fruits of the crime scene investigation had been destroyed.

Again, we had no personal knowledge that all the evidence was destroyed. We knew only what we were told (or not told) by the prosecution. It is my belief that, if Prosecutor Hardy Pickard had been candid about this missing evidence, none of this confusion would have occurred.

9. It is my personal belief that an innocent man has been on death row for 25 years because the prosecution withheld information about the other fruits of the crime scene investigation that were not introduced in Mr. Sweet's trial, and because that evidence would have shown that the State's one key witness (Mr. Sweet) was lying.

Signed under the penalties of perjury this 4th day of June 2008.

_____

Barry P. Wilson

Kelley v. State, Case No. SC08-608

(excerpt from Answer Brief of Appellee (at 23-24):

In addition, Kelley's unsupported speculation that disclosure of these forms would have resulted in access to the crime scene evidence itself is conclusively refuted by the record in this case. Both of Kelley's trial attorneys provided sworn testimony at the postconviction evidentiary hearing that the crime scene evidence had been destroyed prior to trial (PC 354, 366-67). Although Kelley contends that this testimony was based on "incomplete information" because counsel did not have these disposition forms, as previously noted, forms showing the evidence existed in 1967 does not undermine direct testimony that the evidence was destroyed prior to 1984.

Kelley v. State, Case No. CR81-0535
(Fla. 10th Cir. Ct.)
(Excerpt from States' Response to Successive Motion for Postconviction Relief (at 18-19)):

In addition, Kelley's unsupported speculation that disclosure of these forms would have resulted in access to the crime scene evidence itself is conclusively refuted by the record in this case. Both of Kelley's trial attorneys provided sworn testimony at the postconviction evidentiary hearing that the crime scene evidence had been destroyed prior to trial (Kelley PC 354, 366-67). Although Kelley contends that this testimony was based on "incomplete information" because counsel did not have these disposition forms (Motion, p. 7), as previously noted, forms showing the evidence existed in 1967 does not undermine direct testimony that the evidence was destroyed prior to 1984. In fact, Kelley has no way to prove what information was known by counsel, since it is not disclosed in the record and both trial attorneys are now deceased